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POLICE GUIDELINES

pretrial eyewitness identification procedures

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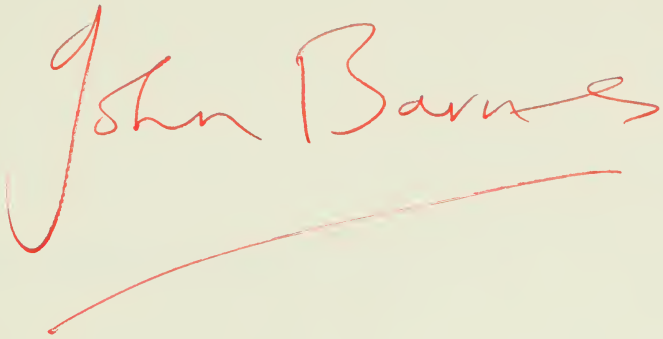
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POLICE GUIDELINES

PRETRIAL EYEWITNESS IDENTIFICATION PROCEDURES

Criminal Law Series

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Criminal Law Series

A Study Paper prepared for the

Law Reform Commission of Canada

by

Neil Brooks

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Preface

The identification of a suspect by an eyewitness is, in many cases, the only or the most important evidence of the suspect's guilt. However, the courts have often noted the potential dangers inherent in the pretrial procedures relating to eyewitness identification. Common to many of these cases is an expressed concern about: the lack of well-known, uniform identification procedures; the dangers inherent in suggestive procedures; and the inability to reconstruct and thus evaluate the trustworthiness of such procedures at trial.

The guidelines proposed in this Study Paper establish uniform rules for obtaining verbal descriptions of the suspect from an eyewitness; for preparing sketches and composites of the suspect; and for conducting lineups, photographic displays, informal viewings and confrontations. These guidelines are based primarily upon judicial authority and present police practices. However, as well as dealing with the subject comprehensively, the guidelines depart from present law and practice where necessary, in order to achieve the purposes enunciated in Rule 101 (p.17).

Form of the Guidelines

The guidelines are drafted as a comprehensive code. They are drafted in a style intended to make them understandable to police officers who have no legal training. They are structured to facilitate their use in police training manuals and day-to-day police work. They are not drafted in the form of legislation.

When the Law Reform Commission of Canada nears the completion of its work on criminal procedure, a decision will have to be made about the form any recommendations relating to pretrial identification procedures should take. Many of these guidelines are not suitable for legislative enactment: for example, those that deal with the detail of organizing and conducting pretrial identification tests.

One possible form they might take would be to enact as part of a comprehensive code of criminal procedure those rules that apply to

identification procedures generally, those that state the general goals of the regulation of identification procedures and those rules that embody important substantive policy judgments. The more detailed guidelines could then either be passed as regulations or as schedules to the statute, or simply left to be adopted by particular police forces. This approach would permit the flexibility necessary in drafting detailed guidelines that must apply to a wide variety of circumstances.[1]

It is more likely that the guidelines would be followed if they acquired statutory authority, either by being enacted as a schedule to a code of criminal procedure, or as regulations. The danger of implementing them in this form is that they might be construed strictly, as criminal legislation commonly is, and time and resources wasted arguing about their application in trial and appellate courts. There is also a danger that any slight deviation from them might result in the exclusion at trial of otherwise reliable evidence or in some other inappropriate sanction. However, both of these concerns could be dealt with in the legislation.[2]

Problems in Drafting Comprehensive Guidelines

At least two problems make the drafting of comprehensive and uniform guidelines difficult. First, identifications have to be obtained under a wide variety of circumstances over which the police have no control. The procedures to be followed are likewise varied. A second problem with uniform rules is that they must take account of the wide variety of communities and police forces across the country. For example, unlike small communities, large communities can afford sophisticated facilities and specialized officers. On the other hand, witness and public co-operation might be more difficult to obtain in urban areas.

However, the proposed legislation would not lead to iron-cast rules to be followed to the same extent by all police forces. The rules recognize the need for flexibility on the part of law enforcement authorities conducting identification procedures in very different communities across Canada. The intent of the rules is to provide clear administrable guidelines to ensure that the best possible procedure is followed in the circumstances. Thus the proposed guidelines attempt to provide, on the one hand, detailed standardized techniques for conducting identification procedures, and on the other hand, flexible guidelines so that exceptional cases and circumstances can be considered. Uniformity in a diverse federal state like Canada does not mean identical practice; rather, it signifies adherence to general federal standards.

Furthermore, with respect to the potential difficulty of uniform rules, too much should not be made of the differences between communities.

For example, in a survey of nineteen Canadian cities which included those cities where the vast majority of identifications would take place, it was found that all the police departments had specialized facilities for conducting lineups and other pretrial eyewitness identification procedures.

Legal Jurisdiction of the Federal Government

There might be some question as to whether the federal government in Canada has the constitutional competence to legislate on matters relating to pretrial eyewitness identification procedures. The federal government has the power to legislate for the criminal law (including procedure in criminal matters),[3] while the provinces have power over the administration of justice in the province.[4] Which of these heads of power the regulation of pretrial identification procedures falls within, is a difficult question. In its general provisions as to arrest and release from custody, the *Criminal Code* seems to assume that pretrial identification procedures come under its aegis;[5] federal competence is also suggested by the existence of the *Identification of Criminals Act*;[6] and observations made in at least two Supreme Court of Canada cases suggest that Parliament has legislative competence in this area. In *Di Iorio and Fontaine* v. *Warden of the Common Jail of Montreal and Brunet*,[7] Mr. Justice Dickson assumed that "police investigation of an individual must comply with federal standards of criminal procedure". In a subsequent decision, *Attorney General of Quebec and Keable* v. *Attorney General of Canada*,[8] Mr. Justice Estey noted that "a Province may investigate an identified crime in the manner and through the procedures prescribed by Parliament".[9] Finally, if provision for the conduct of pretrial identification procedures were not under Parliament's legislative competence as a matter pertaining to "criminal procedure", it would be difficult if not impossible to draw a line between such procedures and other procedures that are characterized as "criminal procedure".[10]

Background Survey

To assist in preparing these guidelines, a survey of present police practices in Canada relating to pretrial identification procedures was undertaken. The purposes of this survey were to establish the need and possibilities for reform as well as to provide ideas for improvements. Initially, police officers were interviewed personally in six Ontario cities: Ottawa, Toronto, London, Kingston, Hamilton and Guelph. Because it became apparent that practices varied so greatly, a country-wide survey was undertaken. A formal written questionnaire consisting of over one hundred questions was sent to thirteen police departments across Canada: Victoria, Vancouver, Edmonton, Calgary, Regina, Winnipeg, Montréal,

Trois-Rivières, Sherbrooke, Fredericton, Saint John, Halifax and St. John's. In some cities more than one police division completed the questionnaire. The questionnaires were completed by detectives in the relevant police divisions, and it was understood that the answers were to simply reflect their view of the local practice. Thus, the answers in no way reflect the official policy of police departments, or the point of view of any officer other than the one completing the questionnaire. Since the survey was not intended to be a comprehensive survey of police practices, the references to the surveys throughout this paper are selective. No attempt is made to state precise practice in particular police departments. Because of the nature and the purpose of the survey, the references to them are intended to provide only an impressionistic sense of present practices. A tabulation of the answers to the survey is on file at the Law Reform Commission of Canada.

The guidelines are set out in Chapter Two. Then in Chapter Three, each rule is individually commented upon. The commentary explains the reasons for the rule, reviews Commonwealth cases on related issues, and briefly describes present Canadian practice.

CHAPTER ONE

Introduction

I. The Need for Guidelines

The idea of drafting guidelines to govern eyewitness identification procedures is not novel. Most large police forces in Canada use some form of written guidelines, which are usually prepared by the local police force, to instruct and guide their officers in conducting pretrial identification procedures, particularly lineups.[11] In England, a Home Office Circular provides a fairly detailed procedure for police to follow when conducting identification parades and using photographs in identifying criminals.[12] In the United States, many American police departments have adopted written guidelines to follow in conducting identification procedures,[13] and commentators have urged that all police departments should have a detailed set of such guidelines.[14] The American Law Institute proposed legislation in its *Model Code of Pre-Arraignment Procedures* which, while providing general rules governing identification procedures, would mandate the issuance of detailed regulations by local law enforcement agencies.[15] In order to assist local police forces in drafting guidelines, the Project on Law Enforcement Policy and Rulemaking at the College of Law, Arizona State University, prepared a set of model rules for eyewitness identification.[16] Also, law reform bodies in many common law countries have recently studied the problem of eyewitness identification and have made recommendations relating to pretrial procedures.[17] As a result of these recommendations, it would appear that future legislation relating to criminal procedure will invariably contain rules regulating identification procedures.[18]

The need for comprehensive police guidelines for the conduct of pretrial identification procedures arises from two concerns. First, there is a general concern relating to the necessity for detailed rules to guide the exercise of police discretion in common law enforcement situations. Second, there is a specific concern for the dangers inherent in eyewitness testimony, requiring that this type of evidence, in particular, be treated with great caution and in

accordance with well-informed practices. Although guidelines cannot eliminate these concerns, they can enhance the reliability and fairness of pretrial identification procedures to the advantage of law enforcement officers, the accused, judges, juries and, indeed, the overall administration of criminal justice.

A. The Need to Structure the Exercise of Police Discretion

Much has been written about the need to structure the discretion exercised by the police in the discharge of their law enforcement duties.[19] The general policy of providing explicit and detailed guidance to the police has a number of advantages, which these guidelines attempt to achieve. First, the policies and practices of police forces are made unambiguous and visible so that they can be discussed and debated and the best procedures developed. Second, the police are given clear directions on how to proceed to ensure that the accused's rights are protected and that the evidence collected by them is admissible at trial and is as probative as possible. Finally, uniformity of police practices is promoted to the fullest extent possible.[20] Particularly in the area of pretrial eyewitness identification, where the problems are so many and so varied, and the consequences so significant to the fair conduct of a criminal proceeding, structuring the exercise of police discretion would appear to be not only justifiable but essential.

The courts have not been able to provide the police with the direction required in this area. Because Canadian courts do not exclude evidence of an improperly conducted pretrial identification procedure, an issue relating to such procedures is seldom raised in a case on appeal. When it is raised, other issues invariably overshadow it. Thus, only rarely will a court even remark on the conduct of pretrial identification procedures.[21]

Even if a court does have an opportunity to address an issue relating to the conduct of a pretrial identification procedure, because of its institutional characteristics, it is an inappropriate forum for providing the necessary degree of direction for police conduct of pretrial identification procedures. Since it is restricted to the facts and issues raised in a particular case, a court cannot prescribe a procedure that must be integrated into an overall scheme of pretrial procedure. Furthermore, since it must base its decisions on broad principles, and apply them to specific factual situations, a court cannot provide the arbitrary but clear-cut rules sometimes required in this area.[22] Finally, since it must rely for the most part upon the evidence presented to it by the parties, a court cannot always conveniently review,

and certainly it cannot conduct, the empirical research that might be essential in reaching an informed judgment on some of the issues related to eyewitness identification procedures.

B. Dangers Inherent in Eyewitness Testimony

The need for comprehensive police guidelines is particularly acute in the area of pretrial eyewitness identification procedures, because eyewitness testimony is inherently unreliable. This section's discussion of the dangers inherent in eyewitness testimony will serve to make the case for comprehensive guidelines, and to establish some of the problems that such guidelines must deal with, as well as their limitations. The first subsection reviews actual cases in which wrongful convictions have resulted from mistaken eyewitness identifications. The second subsection examines psychological studies that have documented the frailties of human perception and memory, revealing the inherent unreliability of this kind of evidence. A third subsection reviews the reasons why eyewitness testimony is difficult to assess: cross-examination is often ineffective in exposing its unreliability and jurors are often overimpressed with its probative value.

Properly conducted pretrial identification procedures cannot remove all the dangers inherent in eyewitness testimony. They can, however, ensure that judges and juries are presented with the most reliable identification evidence possible, and that the potential influence of the pretrial procedures on a witness's testimony is apparent and capable of assessment.

1. Cases of Wrongful Conviction

In many criminal cases, the evidence against the accused rests upon the assertion of one or more witnesses that they can identify the accused as the perpetrator of the crime. However, of all types of evidence, eyewitness identification is most likely to result in a wrongful conviction. This has long been recognized by commentators. In Great Britain, the Criminal Law Revision Committee stated in its *Eleventh Report* that "[w]e regard mistaken identification as by far the greatest cause of actual or possible wrong convictions."[23] This view is borne out by the hundreds of known cases in which innocent people have been convicted, imprisoned and sometimes executed after trials in which the prosecution's case depended largely upon eyewitness accounts. The more notorious cases have been well documented

by American and British authors.[24] Indeed, in the studies of wrongful conviction it is invariably concluded that misidentification is the greatest source of injustice.[25]

Professor Borchard, who studied sixty-five cases of wrongful conviction, found that in twenty-nine of them, mistaken eyewitness identification was largely responsible. In eight of these cases the wrongfully convicted person and the criminal bore no resemblance at all to each other, in twelve cases the resemblance was only slight, and in only two cases was the resemblance striking.[26] Brandon and Davis, who in 1973 completed an exhaustive study of English cases of wrongful conviction, also concluded that mistaken identification was the most common cause of wrongful conviction.[27] Indeed, recently in England, because of a number of well-publicized cases of wrongful conviction based on eyewitness testimony, a special departmental committee chaired by the Right Honourable Lord Devlin was established to inquire generally into the problems of eyewitness identification.[28]

In many cases of wrongful conviction, there is more than one mistaken eyewitness. A recent notorious case occurred in the United States in 1979; it involved a Roman Catholic priest who was accused of robbing several convenience stores. Seven witnesses under oath at trial identified the priest. Fortunately, before the defence opened its case-in-chief, the real criminal confessed to the crime.[29] However, wrongful conviction cases involving as many as thirteen,[30] fourteen (a Canadian case)[31] and even seventeen[32] eyewitnesses have been reported. In the most notorious instance of mistaken identification, an accused was mistakenly identified by twenty-three witnesses.[33]

Surveys of the known cases of wrongful conviction fail to reveal the full scope of the problem. Cases of wrongful conviction are drawn to public attention only in exceptional cases, such as those in which a person confesses to a crime for which another has been convicted. One can only speculate about the total number of cases in which innocent people have been convicted due to erroneous identification. Although there have been relatively few such reported cases of wrongful conviction in Canada, the fact that the safeguards required by our courts and adopted by our law enforcement authorities are no more, and in some respects even less, stringent than those in England and the United States suggests that Canada is not immune to the problem.

2. Unreliability of Eyewitness Testimony

Jurists frequently and somewhat misleadingly refer to testimonial proof as "direct evidence". It is contrasted with circumstantial proof, which is

referred to as "indirect evidence". Upon analysis, there is nothing very direct about testimonial proof. It requires the trier of fact to draw the inference that because a witness says "that is the person I saw", it is in fact the person the witness saw. In determining how probable this inference is, the trier must determine the likelihood that the witness: (i) correctly perceived the suspect, (ii) correctly remembered the details of the suspect's identity, (iii) correctly narrated the identification, and (iv) was sincere when he or she identified the accused.

Many jurists have appreciated the logical processes involved in testimonial proof and the fact that it is misleading to refer to it as direct evidence. For example, in 1933 the High Court of Australia pointed out that a witness who says "the prisoner is the man who drove the car", while appearing to affirm a simple proposition, is really saying: "that he observed the driver; that the observation became impressed upon his mind; that he still retains the original impression; that such impression has not been affected, altered or replaced, by published portraits of the prisoner; and that the resemblance between the original impression and the prisoner is sufficient to base a judgment, not of resemblance, but of identity."[34] In a sentence frequently quoted by other courts, a Canadian judge noted, "[a] positive statement 'that is the man' when rationalized, is found to be an opinion and not a statement of single fact."[35]

Although the logical processes of testimonial proof are frequently appreciated by jurists, the psychological processes are less well understood, in spite of the urgings of psychologists.[36] Yet, in evaluating testimonial proof, the full range of physiological and psychological factors that might cause people to misperceive or forget details of faces, to narrate their mental impressions of faces misleadingly, or to be insincere, must be considered. It is clear that a person's original perception of a face or an event can be influenced, not only by physiological factors, the stimulus conditions at the time of the perception, and the normal factors that affect the fallibility of all perceptual judgments, but also by such subjective factors as stress, personal prejudices, expectations (cultural or learned from past experience), biases, group pressure, ego involvement, psychological needs, emotional states, social attitudes and stereotypes. Both visual memory and the verbal description of images retained in memory are similarly affected by an equally wide range of factors.

Recently, a number of psychologists have directed their attention to the problem of eyewitness testimony. They have made a systematic effort to inform the legal system of their knowledge of perception and memory, so that it might be of assistance in evaluating testimonial proof.[37] This research should prove useful in the evaluation of eyewitness testimony, and, if properly used, should prevent some miscarriages of justice. Even if it is not relied upon directly in the evaluation of testimony, this research makes

apparent the frailties of eyewitness testimony and explains why it can so easily lead to wrongful convictions.

Simply by way of illustration, psychologists have shown that much of what one thinks one saw is really perceptual filling-in. Contrary to the belief of most laymen, and indeed some judges, the signals received by the sense organs and transmitted to the brain do not constitute photographic representations of reality. The work of psychologists has shown that the process whereby sensory stimuli are converted into conscious experience is prone to error, because it is impossible for the brain to receive a total picture of any event. Since perception and memory are selective processes, viewers are inclined to fill in perceived events with other details, a process which enables them to create a logical sequence. The details people add to their actual perception of an event are largely governed by past experience and personal expectations. Thus the final recreation of the event in the observer's mind may be quite different from reality.

Witnesses are often completely unaware of the interpretive process whereby they fill in the necessary but missing data. They will relate their testimony in good faith, and as honestly as possible, without realizing the extent to which it has been distorted by their cognitive interpretive processes. Thus, although most eyewitnesses are not dishonest, they may nevertheless be grossly mistaken in their identification.[38]

As well as studying factors that might affect a witness's original perception of an event, psychologists have examined a wide range of factors that might influence a witness's subsequent identification of a person as the person seen. For example, a number of studies have documented the dramatic effect that the manner and form in which questions are asked of a witness have on the witness's retrieval of information from memory.[39] Others have examined the subtle biases that might be present in other aspects of the identification procedure, for example, the lineup.[40]

Many of the factors leading to mistaken identification, such as those surrounding the original identification, cannot be eliminated or controlled. However, a proper understanding of them should assist in the evaluation of testimony. Some factors that might affect a witness's memory and retrieval from memory can be controlled in the pretrial identification procedure — such as the manner in which the witness is questioned and the conduct of the recognition test (which in most cases is a lineup).[41] It is the latter factors these guidelines attempt to eliminate. It is likely that these factors pose the most serious threat to the precept that no innocent person should be convicted.[42]

Psychologists have also undertaken studies that have directly demonstrated the inherent frailties of eyewitness testimony. These studies normally involve a "staged" assault, in which witnesses later attempt to identify the

assailant. The number of witnesses able to make an error-free positive identification is always low — in some cases, no greater than chance.[43]

3. Difficulty of Evaluating Eyewitness Testimony

Even though a type of evidence may be unreliable, that alone does not justify a concern about the danger of wrongful conviction. Many forms of evidence adduced at trial are unreliable. Indeed, it can be said that in every trial, all of the evidence led by one party will ultimately be found to have been unreliable. The efficacy of the trial depends upon the ability of the trier of fact to evaluate the evidence and determine which is reliable and which is not. Eyewitness testimony, then, is a dangerous form of evidence not only because it is unreliable, but because it is extremely difficult to evaluate. This is so because cross-examination, which is often effective in exposing the unreliability of other evidence, is frequently ineffective in exposing the unreliability of eyewitness testimony. Also, the jury tends to place undue reliance on eyewitness testimony, even when its dangers have been revealed.

(a) Ineffectiveness of Cross-Examination

Occasionally the defence may disclose perceptual errors at trial through effective cross-examination. It may be possible to reveal that due to the circumstances surrounding the witness's observation of the event (for example, the distance between the witness and the offender, or the short observation period), it would have been impossible for him or her actually to observe all the details of the event that he or she purported to remember. Furthermore, because witnesses will usually be aware of defects in their senses (such as near-sightedness), and assuming that they do not seek to mislead the court, information bearing upon such things as the witness's ability to perceive will also ordinarily be disclosed at trial. For those witnesses who are mistaken about the conditions surrounding their observation of the event, or who are unaware of weaknesses in their sense organs or simply refuse to admit to them, it might be possible for the defence to uncover such facts through independent testimony or by means of in-court testing.

However, many variables that affect the reliability of eyewitness testimony, such as perceptual filling-in, are virtually impossible to expose through cross-examination. In most cases identification evidence will be given by an honest witness with normal powers of observation, who claims to have seen the accused under circumstances that would have

afforded adequate opportunity for observation. In such a case it is exceptionally difficult to assess the value of identification evidence. Since there is nothing more than the bare assertion of a witness that the accused is the person whom he or she observed in the criminal circumstances, cross-examination is largely ineffective. As was noted by the Devlin Committee in relation to this difficulty:

> The weapon of cross-examination is blunted. A witness can say that he recognizes the man and that is that or almost that. There is no story to be dissected, just a simple assertion to be accepted or rejected. If a witness thinks that he has a good memory for faces when in fact he has a poor one, there is no way of detecting the failing.[44]

Similarly, if the witness was induced through suggestion or some other form of bias to identify the suspect in a lineup or other identification procedure, this will be almost impossible to establish on cross-examination. It is a common experience that even identifications that were initially very tentative become more positive as the trial progresses. At trial, witnesses will often be absolutely certain of their identifications, not being aware that they might have been influenced by biased procedures.

It was this concern about the inability effectively to cross-examine an eyewitness that led the Supreme Court of the United States to adopt a rule excluding evidence of impermissibly suggestive pretrial identification procedures. In *United States* v. *Wade*[45] the court approved an observation made by two English scholars:

> It is a matter of common experience that, once a witness has picked out the accused at a line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may ... for all practical purposes be determined there and then, before the trial.[46]

Psychologists have also noted that eyewitness testimony is dangerous because often it cannot be assessed by the usual tests of coherence and demeanour.[47]

(b) Jurors' Undue Reliance on Eyewitness Testimony

Another problem lies in the fact that people generally, and jurors specifically, are not aware of the dangers inherent in the identification of others. They are consequently inclined to accept identification evidence uncritically and attach undue weight to it. This fact has been a common observation among legal commentators.[48] It is certainly a notion generally entertained by prosecutors who, in deciding whether to proceed to trial, attach great significance to whether the Crown's case is supported by eyewitness testimony.[49] The notion is undoubtedly founded on the knowledge that in a good number of cases, jurors are prepared to convict the accused on the testimony of only one eyewitness. Although this

knowledge is usually based only upon anecdotal evidence, it has been confirmed in a recent survey in England. In a study of lineups undertaken for the Devlin Committee, it was found that out of 850 people prosecuted in cases in which a lineup had been held, 347 were prosecuted even though the only substantial evidence against them was the testimony of eyewitnesses (in 169 of these cases the only evidence was that of a single witness); 74 per cent of these people were convicted.[50]

That jurors place undue reliance on eyewitness testimony is also illustrated by cases in which jurors choose to rely upon discredited eyewitness testimony instead of apparently reliable contrary evidence. For example, in a recent English case, a person was convicted of shoplifting on the basis of eyewitness testimony in spite of the fact that thirty alibi witnesses supported his own testimony that he was on a bus over one hundred miles from the scene of the crime.[51]

Psychological studies also confirm the fact that jurors place undue reliance on eyewitness testimony. A recent study by Professor Loftus involved a simulated criminal trial using 150 students as jurors. Each experimental juror received a description of a grocery robbery and murder, a summary of the circumstantial evidence pointing to the accused's guilt, and the arguments presented at trial. One-third of the jurors were told that there had been no eyewitnesses. Only 18 per cent of these jurors found the defendant guilty. Another third of the jurors were given the same set of facts, but in addition were told that the clerk testified he had seen the defendant shoot the two victims; that is to say, the jurors were told that there had been an eyewitness. The defence counsel claimed the clerk was mistaken. Of these jurors, 72 per cent judged the defendant to be guilty. A final third of the jurors were told of the clerk's eyewitness testimony but were informed that the defence had discredited him by showing that he had not been wearing his glasses at the time and had uncorrected vision poorer than 20/400. Still, 68 per cent of the jurors who had heard this evidence discrediting the eyewitness voted for conviction. If the eyewitness testimony had been completely ignored by them, as it should have been in light of the discrediting testimony, only 18 per cent should have voted for conviction, the same number that voted for conviction in the first third which heard only the circumstantial evidence.[52] This study tends to reveal the enormous credibility that jurors (lay persons) attach to eyewitness testimony. Other psychological studies have also tended to show that jurors are over-believing of eyewitnesses,[53] or at least that they cannot detect differences between reliable and unreliable identification witnesses.[54]

These studies really only confirm our intuitive judgments: one assumes that jurors rely on eyewitness testimony.[55] They evaluate testimony largely on the basis of their everyday experiences, and ordinarily have no occasion to test the limits of their capacity to recognize

faces. Indeed, since most jurors trust their ability to identify faces in conducting their day-to-day affairs, they are likely to trust eyewitnesses.[56] Moreover, most people assume that police procedures operate adequately in the vast majority of cases; therefore, they tend not to scrutinize individual cases carefully.

II. The Rationale of Guidelines

As the reports of cases of wrongful conviction reveal, mistaken eyewitness identification poses a serious threat to the administration of justice. There are no simple solutions to the problems posed:

(a) Eyewitnesses' original observations of the person they saw were often made under stressful and sub-optimal conditions, thus rendering their memory of the person very fragile and unreliable.

(b) It is difficult to expose the errors that eyewitnesses might have made in their identification because they are likely to be totally honest in expressing their opinion that the accused is the person they saw and be totally unaware of the factors that caused them to misperceive or mistakenly identify the accused.

(c) Jurors tend to place undue reliance on evidence of identification, even when it depends upon the evidence of a single witness.

It is not possible to improve a witness's original perception of events. However, it may be possible to establish procedures which will tend to minimize the dangers of eyewitness identification evidence. Commentators have recommended a number of rules of evidence and procedure to be implemented at the trial, in order to reduce the danger of wrongful conviction.[57] It has been recommended: that eyewitness testimony be required to be corroborated in order to support a conviction; that the judge in all eyewitness testimony cases instruct the jury to critically evaluate the witness's evidence, bearing in mind that innocent people have, in the past, been convicted on the basis of honest but mistaken identification by one or more witnesses and; that expert psychological evidence be admissible in order to assist the jury in rationally evaluating the testimony.

However, in this paper the principal concern is with procedures prior to trial that will minimize the risk of wrongful conviction on the basis of eyewitness testimony. This is the area where there is the greatest potential for reducing the risk of wrongful conviction.[58] Properly conducted pretrial procedures should partially screen out inaccurate

eyewitness testimony through unsuggestive testing procedures. At the very least, it is essential that a witness's already imperfect perception or recall of an event not be made to appear more credible and certain by virtue of suggestive police practices. Steps can be taken to ensure, as much as possible, that identification evidence given by eyewitnesses at trial is derived exclusively from their original viewing of the event, and is independent of any outside assistance.

The guidelines build on the premise that the police should always employ the most reliable identification procedure available. If the most reliable procedure is impractical, a less reliable procedure is permissible since it then represents the "best evidence". Thus, in-court dock identifications are generally prohibited unless the witness has attempted to identify the accused prior to trial. Lineups must be employed whenever possible; if a lineup cannot be used, a photographic display should be used; if a photographic display is impractical, an informal viewing may be used; finally, and only in very limited circumstances, a confrontation or show-up may be held. In addition to the value of reliability, the rules also consider the need to protect the rights of the accused and the need for effective law enforcement. The general principles upon which these guidelines are premised are discussed in detail in the commentary to Rule 101 (p. 35), which sets out the basic purposes of the guidelines.

As mentioned above, the conclusion of this Study is that a lineup is a better identification test than a photographic display. However, this is an issue upon which there are strong differences of opinion among informed commentators. The arguments, which are reviewed in detail in the commentary to Rule 501 (p. 98), do not point conclusively to one test or the other. Obviously, this is an important issue that needs further thought and research.

CHAPTER TWO

The Guidelines

Part I. The Scope of Guidelines

Rule 101. Purposes

The purposes of these guidelines are:

(a) *To Establish Uniform Procedures.* To establish uniform procedures for conducting pretrial eyewitness identifications of suspects.

(b) *To Increase the Reliability of Identifications.* To ensure that eyewitness identification procedures are reliable. To this end, the guidelines permit the expeditious holding of identification procedures and assist in preserving the accurate recollection of witnesses.

(c) *To Reduce the Risk of Mistaken Identification.* To minimize the possibility of mistaken identification. To this end, the guidelines require that eyewitnesses attempt to identify suspected offenders in unsuggestive circumstances, and discourage them from identifying a person in an identification procedure simply because he or she is the person who most closely resembles the person they saw.

(d) *To Protect the Rights of Suspects.* To ensure that the rights of any person identified are not prejudiced. To this end, the guidelines establish rules that will require suspects to be fully informed of the nature of the procedures and of their rights, and will permit pretrial identification procedures to be reconstructed at trial.

Rule 102. Definition of "Eyewitness Identification Procedures"

As used in these guidelines, "pretrial eyewitness identification procedures" refer to the following procedures:

(a) *Taking Descriptions.* Taking a verbal description of a suspect from an eyewitness.

(b) *Preparing Artist's Drawings and Composites.* Preparing a non-photographic pictorial representation (e.g., a free-hand sketch or identi-kit composite) of a suspect from an eyewitness.

(c) *Conducting Photographic Displays, Lineups, Informal Viewings, and Confrontations.* Conducting a photographic display, lineup, informal viewing or confrontation in order to obtain an eyewitness identification.

Rule 103. Definition and Role of "Supervising Officer"

The officer who is responsible and has the authority for ensuring that a pretrial eyewitness identification procedure is conducted pursuant to these guidelines shall be known as the "supervising officer". If at all possible, the supervising officer should not be otherwise involved in the investigation or prosecution of the case.

Rule 104. Definition and Role of "Accompanying Officer"

An "accompanying officer" is any officer who accompanies witnesses when they view a lineup or a photographic display or take part in an informal viewing. If at all possible, the accompanying officer shall not be otherwise involved in the investigation or prosecution of the case and shall not know of the identity of the suspect, if there is one.

Rule 105. Restrictions on Eyewitness Identifications

No police officer shall attempt to secure the identification by an eyewitness of any person as a person involved in a crime unless the pretrial eyewitness identification procedures established by these guidelines are followed or unless for one of the reasons provided in Rule 107, such a procedure is unnecessary.

Rule 106. Prerequisite to Trial Identification

No eyewitness shall identify the accused at trial unless he or she has identified the accused at a pretrial eyewitness procedure or unless for one of the reasons provided in Rule 107, such a procedure is unnecessary.

Rule 107. When Procedures Established by Guidelines are Unnecessary

A pretrial eyewitness identification procedure as required by these guidelines may be unnecessary in the following circumstances:

(a) *Inadequate Recollection.* The witness would be unable to recognize the perpetrator of the offence being investigated. However, if the person is a potential eyewitness, this shall be recorded, along with any relevant information as provided in Rule 206.

(b) *Prior Knowledge.* The witness knew the identity of the suspect before the offence occurred (e.g., the suspect was a personal acquaintance, relative, neighbour, or co-worker).

(c) *Independent Identification.* The witness, without police assistance, learned of the identity of the suspect after the offence occurred (e.g., the eyewitness recognized the suspect's picture in a newspaper or spotted the suspect at his or her place of employment).

(d) *Continued Observation.* The witness maintained surveillance of the suspect from the time of the commission of the offence to the time of the suspect's apprehension.

(e) *Identity Not Disputed.* The accused does not dispute the issue of identity.

Rule 108. Modification of Guidelines in Special Circumstances

If it is necessary in special circumstances to obtain an identification that might otherwise not be obtained, these guidelines may be modified, provided there has been as full a compliance as is practicable.

Part II. General Rules

Rule 201. Separating Witnesses

When there is more than one witness, they shall not take part in a pretrial eyewitness identification procedure in one another's presence.

Rule 202. Avoiding Witness's Suggestions

A witness who has taken part or who might take part in a pretrial eyewitness identification procedure shall be instructed not to discuss the suspect's appearance with other witnesses. If possible, witnesses shall be escorted in such a way that they do not encounter one another before or after engaging in a pretrial identification procedure. If witnesses are together, a police officer shall be present, to ensure that they do not discuss the suspect's appearance.

Rule 203. Avoiding Police Officer's Suggestions

Police officers shall not by word or gesture suggest to any witness who they think the suspect is. If they must confront the witness with a suspect, they shall do so in a way that minimizes the appearance of their degree of belief in the suspect's guilt. A police officer shall not say anything to the witness during or after the proceedings that suggests that the witness correctly described or identified the suspect.

Rule 204. Inviting Witnesses to Attend

When inviting witnesses to attend a pretrial identification procedure, the police shall only suggest that they have a possible suspect.

Rule 205. Instructing Witnesses

When conducting a procedure that requires witnesses to attempt to identify the person they saw from a group of people (or photographs), the accompanying officer shall instruct the witnesses:

(a) *To Study.* To take their time and to cast their minds back to the witnessed event, and to examine carefully all participants (or photographs) in the lineup (or photographic display) before identifying anyone as the person they saw.

(b) *To Exercise Caution.* That it is very easy to make mistakes in identifying people and therefore to exercise caution in identifying someone.

(c) *That the Person May Not Be Present.* That the police do not strongly suspect anyone of the crime and that the person they saw (or his or her photograph) may not be present.

(d) *To Identify the Person They Saw.* To indicate whether they can positively identify anyone as the person they saw.

(e) *To Indicate the Degree of Confidence in the Identification.* To indicate how certain they are that the person they identified is the person they saw.

(f) *To Indicate the Basis of Identification.* To indicate the features or describe the overall impression of the person upon which their identification is based.

Rule 206. Maintaining a Record

(1) *Procedures Applicable to All Eyewitness Identification Procedures.* A complete record of each identification procedure, written on a prescribed form, shall be maintained. The record shall contain the following information:

(a) *The Offence.* The alleged offence to which the pretrial eyewitness identification procedure relates.

(b) *Witnesses.* The names and addresses of all witnesses who took part in a pretrial identificaton procedure, whether or not they made an identification.

(c) *Persons Present.* The names of the supervising and accompanying officers, and other police officers and persons present.

(d) *Procedure.* The type, date, time and location of the procedure.

(e) *Statements Made.* Any statements made by, or to, the witness in the course of the procedure.

(f) *Confidence.* If the procedure involves obtaining a description from the witness, a statement as to how confident the witness is that he or she can identify the suspect. If the procedure involves identifying a person, and if the witness identifies a person, a statement as to how confident the witness is that he or she has correctly identified the person he or she saw.

(g) *Basis.* If the witness identifies a person, the features of the person's appearance upon which the identification was made.

(h) *Objections.* Any objections, suggestions or observations made by the suspect or his or her counsel, as well as any action taken in response to such objection or suggestion.

(i) *Other Relevant Factors*:

(i) whether the witness identified any person other than the suspect;

(ii) whether the witness previously discussed the suspect's appearance with any other witnesses;

(iii) whether the witness had previously seen the suspect or a photograph of him or her; and

(iv) any other factor relating to the procedure that might be relevant in assessing the reliability of the witness's identification.

(2) *Procedures Applicable Only to Specific Eyewitness Identification Procedures.*

(a) *Description.* If the procedure involved obtaining a verbal description, all questions asked of the witness and all responses to them.

(b) *Lineup.* If the procedure is a lineup:

(i) the names and addresses of all lineup participants;

(ii) a colour photograph of the lineup;

(iii) a description of any special lineup procedures followed.

(c) *Photographic Display.* If the procedure is a photographic display:

(i) if, when the photographs were shown, there was no suspect, a record that will permit the photographs shown to the witness to be retrieved and placed in the sequence in which they were shown; and

(ii) if, when the photographs were shown, there was a suspect, the photographs shown to the witness as they were affixed to a display board, or the photographs that were handed to the witness for his or her inspection.

(d) *Informal Viewing.* If the procedure involves an informal viewing:

(i) a general desciption of how the informal viewing was conducted;

(ii) the approximate number of people viewed who were similar in description to the suspect;

(iii) the suspect's reaction if he became aware that he was being observed;

(iv) the witness's reaction upon seeing the suspect; and

(v) the reason for holding an informal viewing in lieu of a lineup or a photographic display.

(e) *Confrontation.* If the procedure involves a confrontation:

(i) the exact circumstances surrounding the confrontation;

(ii) the witness's reaction upon seeing the suspect;

(iii) the suspect's reaction if he or she is identified; and

(iv) the reasons for holding a confrontation in lieu of a lineup, photographic display, or informal viewing.

Rule 207. Access to Records

Copies of the records of all pretrial eyewitness identification procedures relating to the case and involving the accused shall be

available to the accused or to his or her counsel prior to trial, whether or not the prosecution intends to offer evidence of any eyewitness identification procedure. Copies of the description of the suspect given by each witness shall be given to the accused or to his or her counsel before a lineup, photographic display or informal viewing is held. All other records shall be given to the accused or to his or her counsel as soon as is reasonably possible but not less than five days after the procedure has been held.

Rule 208. Right to Counsel

(1) *In General.* If a person is suspected of a crime and the police have reasonable cause to arrest him or her, and his or her whereabouts are known, he or she has a right to have a lawyer present at any pretrial eyewitness identification procedure except the procedure of obtaining descriptions from witnesses, unless:

(a) *Counsel Fails to Appear.* Having received a certain minimum notice (for example, twenty-four hours) prior to the time such procedure is to take place, the suspect does not notify a lawyer, or his or her lawyer fails to be present.

(b) *Counsel Is Excluded.* The lawyer is excluded from the identification procedure by the identification officer because he or she was obstructing the identification.

(c) *Exceptional Circumstances Arise.* Awaiting the presence of counsel would likely prevent the making of an identification.

(2) *Advising Suspect of Right to a Lawyer.* The suspect shall be told: that he or she has a right to have a lawyer present to observe the pretrial eyewitness identification procedure; that if he or she cannot afford a lawyer, one will be provided for him or her free of charge; and that the procedure will be delayed for a reasonable time after the suspect is notified (not exceeding twenty-four hours) in order to allow the lawyer to appear.

(3) *Waiver of Right to a Lawyer.* A suspect may waive the right to have a lawyer present, provided the suspect reads (or has read to him or her), and signs the "Waiver of Lawyer at a Pretrial Eyewitness Identification Procedure" form, or makes an oral waiver heard by at least two other persons. The oral statement must show that the suspect had full knowledge of the effect of waiving the right, and the precise words of the suspect's statement must be made part of the record. The suspect shall be informed that any waiver given may be revoked by him or her at any time.

Rule 209. Role of Suspect's Lawyer

(1) *In General.* The suspect's lawyer shall be allowed to consult with the suspect prior to the pretrial eyewitness identification procedure, and to observe the procedure. He or she may make suggestions but may not control or obstruct the procedure.

(2) *Lawyer's Suggestions.* Any suggestions the lawyer makes about the procedure shall be considered and recorded. Those suggestions that would render the procedure more consistent with these guidelines should be followed. The failure of a lawyer to object to certain aspects of the procedure shall not preclude the accused from objecting to those aspects at trial.

(3) *Lawyer's Participation.* A lawyer should be permitted to be present when a witness states his or her conclusion about the identity of the suspect. However, the lawyer should be instructed not to address the witness before the procedure and to remain silent while the witness attempts to identify the suspect. The lawyer may speak with any witness after the procedure, if the witness agrees to speak with the lawyer.

(4) *Communicating with the Witness.* A witness taking part in a pretrial eyewitness identification procedure may be told that he or she is under no obligation to speak with the lawyer, but that he or she is free to speak with the lawyer if he or she so wishes.

Part III. Obtaining Descriptions

Rule 301. From Whom

The police shall attempt to obtain a description of the suspect from all potential eyewitnesses. If a potential eyewitness cannot provide a description of the suspect, this shall be recorded.

Rule 302. When Taken

The police shall at the first reasonable opportunity obtain complete descriptions of the offender from all witnesses. In all cases, such descriptions shall be obtained before the witness attempts to identify a suspect.

Rule 303. Manner of Taking

Descriptions from a witness shall be elicited by questions that evoke the witness's independent and unaided recollection of the offender.

(a) *The Opportunity to Observe.* First, ask the witness questions about his or her opportunity to observe the offender, including such matters as what directed his or her attention to the person observed, the duration of observation, the distance from the person observed, and the lighting conditions.

(b) *A Narrative Description.* Second, ask the witness to describe the offender in a free narrative form.

(c) *Specific Questions.* Third, if the free narrative description is incomplete, ask the witness specific non-leading questions about particular features or characteristics of the offender. However, the witness should be told not to guess about specific details.

(d) *Confidence in the Ability to Identify.* Fourth, ask the witness how certain he or she is that he or she will be able to identify the offender.

Rule 304. Officer to Take Description

If practical, when there is more than one eyewitness, a description of the suspect shall be taken from each witness by a different officer, each of whom is unfamiliar with the description given by other witnesses and the general description of the suspect.

Part IV. Use of Sketches and Composites

Rule 401. Use of Non-Photographic Pictorial Representations

When there is no suspect, and the use of photographs has been or is likely to be unsuccessful, a non-photographic pictorial representation (e.g., free-hand sketch, identi-kit or photo-fit) may be used to assist in identifying a suspect. If such a representation leads to the identification of a suspect, no other sketch, composite or photograph should be

displayed to any other witness; instead, witnesses should be required to attend a lineup. In addition, the witnesses who took part in constructing the non-photographic pictorial representation should be required to attend a lineup for the purpose of testing the identification of the suspect.

Part V. Lineups

Rule 501. Lineups Shall Be Held Except in Special Circumstances

In all cases in which an identification of a suspect by a witness may be obtained, a lineup shall be held, unless one of the following circumstances makes a lineup unnecessary, unwise or impractical:

(a) *No Particular Suspect.* The police have no particular suspect.

(b) *Lack of Distractors.* It is impractical to obtain suitable distractors to participate in a lineup because of the unusual appearance of the suspect, or for any other reason.

(c) *Inconvenience.* The suspect is in custody at a place far from the witness; or, for reasons such as sickness or disability, it would be extremely inconvenient to require the witness or the suspect to attend a lineup.

(d) *Emergency.* Awaiting the preparation of a lineup might prevent the making of an identification; for example, when the witness or suspect is dying.

(e) *Lack of Viewers.* The witness is unwilling to view a lineup.

(f) *Uncooperative Suspect.* The suspect refuses to participate in a lineup or threatens to disrupt the lineup.

(g) *Suspect's Whereabouts Unknown.* The suspect's whereabouts are unknown and there is no prospect of locating him or her within a reasonable period of time.

(h) *Altered Appearance.* The suspect's appearance has been materially altered from what it was alleged to be at the time the offence occurred.

Rule 502. Avoiding Exposure Prior to Lineup

Prior to a lineup, a witness shall not be allowed to view the suspect, or a photograph or other representation of the suspect, except as expressly permitted by these guidelines.

Rule 503. Time of the Lineup

A lineup shall normally take place as soon as practicable after the arrest of a suspect; or before the actual arrest, if the suspect consents. Lineup arrangements (e.g., contacting viewers, obtaining distractors, arranging for a lawyer) shall be completed prior to the arrest whenever possible.

Rule 504. Refusal to Participate

A suspect is under no obligation to participate in a lineup. However, if a suspect under arrest refuses to participate in a lineup, evidence of the refusal may be introduced at trial. A suspect who refuses to participate in a lineup shall be told of this consequence and of the fact that a less safe method of identification such as a photographic display, informal viewing or confrontation may be substituted for the lineup.

Rule 505. Lineup Procedure

(1) *Number of Distractors.* All lineups, except blank lineups, shall normally consist of at least six persons (referred to in these guidelines as "distractors"), in addition to the suspect.

(2) *Persons Disqualified as Distractors.* Normally, no more than two persons from a group of persons whose appearance and mannerisms are unduly homogeneous shall act as distractors in a lineup, unless the suspect is a member of this group of persons. Normally, police officers shall not act as distractors.

(3) *No More than One Suspect.* No more than one suspect shall normally appear in a single lineup.

(4) *Physical Similarity.* The significant physical characteristics of all persons placed in a lineup shall be approximately the same. In determining the significant physical characteristics of the suspect, regard shall be had to the description of the offender given to the police by the witness.

(5) *Distinctive Features.* If the suspect has any distinguishing marks or features they shall be obscured in some way. For example, they may be covered and the corresponding locations on the distractors' bodies similarly covered. Or, all lineup participants may be made up so that they reveal features or marks similar to those revealed by the suspect.

(6) *Clothing.* Lineup participants shall be similarly dressed. Thus, ordinarily, either all or none of the lineup participants shall wear eyeglasses or items of clothing such as hats, scarves, ties, or jackets. Subject to Rule 505(12), the suspect shall not wear the clothes he or she is alleged to have worn at the time of the crime, unless they are not distinctive.

(7) *Identity of Suspect.* If possible, the distractors shall not be aware of the identity of the suspect.

(8) *Positioning of Suspect.* Suspects shall be permitted to choose their initial position in the lineup and change their position after each viewing. They shall be informed of these rights.

(9) *Uniform Conduct of Participants.* The distractors shall be instructed to conduct themselves so as not to single out the actual suspect. In particular, they shall be told to look straight ahead, to maintain a demeanour befitting the seriousness of the proceedings, and not to speak or move except at the request of the supervising officer.

(10) *Suspect's Objections.* Before the entry of the witness, the suspect or his or her counsel shall be asked whether he or she has any objections to the lineup. If objections are voiced, they shall be considered by the supervising officer and recorded.

(11) *Photograph of Lineup.* A colour photograph or videotape shall be taken of all lineups before or while they are being observed by the witnesses. If the accused changes position in the lineup after it has been viewed by one witness, or if the composition of the lineup is in some way changed, another photograph shall be taken before a subsequent witness views the lineup.

(12) *Donning Distinctive Clothing.* If a witness describes the suspect as wearing a distinctive item of clothing or a mask, and it would assist the witness to see the lineup participants wearing such clothing, and if the item (or something similar) can be conveniently obtained, each participant shall don the clothing in the order of his or her appearance in the lineup. If there is a sufficient number of masks or items of clothing, all participants shall don the clothing or masks simultaneously.

(13) *One-Way Mirror.* Witnesses may view the lineup from a viewing room equipped with a one-way mirror.

(14) *Simulating Conditions.* The conditions prevailing at the scene of the offence may be simulated by, for example, altering the lighting in the lineup room, varying the distance from which the witness views the lineup, or concealing aspects of the suspect's appearance that the witness did not observe.

(15) *Compelled Actions.* Lineup participants may be invited to utter specific words or to perform reasonable actions such as gestures or

poses, but only if the witness requests it, and only after the witness has indicated whether or not he or she can identify someone in the lineup on the basis of physical appearance. If possible, the identity of the lineup participant who is asked to engage in a particular action shall be unknown to the witness.

(16) *Method of Identification.* A large number shall be held by all lineup participants or marked on the wall above them. Witnesses shall identify the person they saw by writing down the number held by, or appearing above, that person. To confirm the witness's identification, that person shall be asked to step forward and the witness shall be asked if that is the person.

(17) *Final Objection.* After the departure of the witnesses, suspects or their counsel shall be asked whether or not they have any objections to the manner in which the lineup was conducted.

(18) *Location of Witnesses.* Before viewing the lineup, witnesses shall be placed in a location from which it is impossible to view the suspect or the distractors.

(19) *If More than One Witness.* When there is more than one witness, the witnesses may view lineups composed of different distractors.

(20) *Paying Distractors.* Distractors may be paid a nominal fee.

Rule 506. Lineups Held at Location

If, because of the significance of the context, a more accurate identification may be obtained, the lineup may be held, at the discretion of the supervising officer, at the location where the witness observed the offender committing the offence. In these circumstances, the rules of procedure for conducting a lineup as set out in these guidelines shall be followed to the extent possible.

Rule 507. Blank Lineups

(1) *When Held.* To determine whether a witness is prepared simply to select the most likely looking participant out of the lineup as the suspect, the witness may be asked, at the discretion of the supervising officer, to view more than one lineup. One or more of these lineups may be blank lineups. A blank lineup is one that does not include a suspect.

(2) *Rules of Conduct.* The rules for the conduct of lineups set out above shall apply to blank lineups, except that the blank lineup and the subsequent lineup in which a suspect appears shall be composed of not less than five participants who are of the same general appearance as the suspect. The witness shall not be informed of the number of lineups that he or she will be asked to view.

(3) *Distractors.* No person who appears in a blank lineup may subsequently appear in a lineup in which the accused appears, except as provided in Rule 507(4).

(4) *Misidentification.* If a witness identifies a participant in the blank lineup, he or she shall not be told that the participant is not the suspect. However, the witness may be invited to view a subsequent lineup in which both the suspect and the person originally identified by the witness appear.

Rule 508. Sequential Presentations

(1) *When Held.* To determine whether a witness is prepared simply to select the most likely-looking participant out of a lineup as the suspect, participants may, at the discretion of the supervising officer, be presented to the witness sequentially instead of in a lineup.

(2) *Rules of Conduct.* The rules for the conducting of lineups set out above shall apply to sequential presentations to the extent possible. The witness shall not be told how many potential participants there are, and shall be instructed to indicate the person he or she saw, if and when that person appears.

(3) *Misidentification or Failure to Identify.* If a witness identifies a participant who is not the suspect, he or she shall not be told that the participant is not the suspect; however, the witness may be invited to view the remaining participants. If a witness fails to identify anyone, he or she may be invited to view all the participants in a lineup.

Rule 509. Subsequent Lineups

If a witness does not identify anyone in a lineup (other than a blank lineup) or identifies someone other than the suspect, and a subsequent lineup is held, no suspect or distractor viewed by the witness in the first lineup shall appear in a subsequent lineup viewed by that witness.

Part VI. Showing Photographs

Rule 601. When Photographs May Be Used

The use of photographs to identify criminal suspects is permissible only when a lineup is impractical for one of the reasons specified in Rule 501.

Rule 602. Saving Witnesses to View Lineup

Whenever a witness makes an identification from a photograph and grounds for arresting the suspect are thereby established, or whenever the conditions that, under Rule 501, render the conducting of the lineup impossible, impractical or unfair cease to exist, photographs shall not be displayed to any other witnesses. Such other witnesses shall view the suspect in a lineup. Normally, any witness who selects the suspect from a photographic display shall also view the lineup.

Rule 603. Photographic Display Procedure

(1) *Use of Mug Shots.* Photographs used in a display may consist exclusively of previously arrested or convicted persons. However:

(i) the witness shall not be informed of this fact;

(ii) the photographs shall not be of a kind or quality that indicates that they are of arrested or convicted persons; and

(iii) if possible, some of the photographs shall be of people who have not been previously arrested or convicted, and the witness shall be so informed.

(2) *Alterations of Photographs.* At the request of the witness, alterations such as the addition of eyeglasses, hats or facial hair may be made to copies of any of the photographs. However, if the witness requests the alteration of a particular photograph, the supervising officer shall ensure that similar alterations are made to copies of at least four other photographs of similar-appearing persons if the police do not have a suspect, and to copies of all photographs in the display if the police do have a suspect.

(3) *Each Person's Photograph Shown Once.* Normally, photographs of any particular person shall be shown to the witness only once.

Rule 604. Additional Rules of Procedure for Conducting a Photographic Display When There Is No Suspect

(1) *Number of Photographs.* The witness may be shown the photographs of any number of potential suspects; however, normally not more than fifty photographs shall be shown at any one time. To ensure as accurate an identification as possible, a reasonable number of photographs shall be shown to a witness even if a suspect is selected almost immediately.

(2) *Presentation of Photographs.* The photographs and the manner of their presentation shall not be such as to attract the witness's attention to particular ones.

Rule 605. Additional Rules of Procedure for Conducting the Photographic Display When There Is a Suspect

(1) *Type of Photographs.* The photographs used in the display shall be of people whose significant physical characteristics are approximately the same. In determining the significant physical characteristics of the suspect, regard shall be had to the description of the offender given to the police by the eyewitness. None of the photographs shall be of a kind, quality or in a state that makes it conspicuous. If possible, the photographs shall be in colour.

(2) *Number of Photographs.* The witness shall be shown an array of photographs composed of the suspect's photograph and those of at least eleven distractors.

(3) *Presentation.* The photographs shall be fixed upon a display board in a manner that does not attract the witness's attention to particular ones; or, the photographs shall simply be handed to the witness for his or her examination.

(4) *Blank Photographic Displays.* The witness may be shown a photographic display or handed a group of photographs that does not contain a photograph of the suspect, prior to a display that does contain a photograph of the suspect. In such circumstances, the guidelines for conducting a blank lineup shall be followed to the extent possible.

(5) *Multiple Poses.* If more than one photograph of the suspect appears in a photographic display, an equal number of photographs of each subject shall appear.

(6) *More than One Witness.* When there is more than one witness, the witnesses may view different photographic arrays.

Part VII. Informal Identification Procedures

Rule 701. When Informal Identification Procedures May Be Used

Informal identification procedures (viewing the suspect in a natural setting such as a hospital, shopping centre, bus depot, or the scene of a crime) may be used only in the following circumstances:

(a) *Suspect at a Particular Locale.* When the suspect is unknown, but is known or suspected to be in a particular locale (this includes the procedure of transporting witnesses in police cars to cruise the general area in which a crime has occurred, in the hope of spotting the perpetrator; or taking the witness to restaurants or other places where the suspect might be).

(b) *Suspect Unable to Attend Lineup.* When the suspect has been hospitalized or cannot otherwise attend a lineup, but can be viewed along with similar-appearing and similarly-situated people by the witness.

Part VIII. Confrontations

Rule 801. When Permissible

A police officer may arrange a confrontation between a suspect and a witness for the purpose of identification only in the following circumstances:

(a) *Urgent Necessity.* In cases of urgent necessity, as where a witness is dying at the scene of the crime; or, for one of the reasons provided in Rule 501, a lineup, a photographic display, or informal viewing cannot be held.

(b) *Lineup or Photographic Display Attempted.* The witness was unable to identify the suspect in a lineup, photographic display, or informal viewing.

Rule 802. Impartiality During Confrontation Procedure

Whenever possible, in presenting a suspect to a witness for identification, an officer shall not say or do anything to lead the witness to believe that the suspect has been formally arrested or detained, that he or she has confessed, possessed incriminating items on his or her person when searched, or is believed to be the perpetrator. In all cases, the suspect shall be presented to the witness in circumstances that minimize the suggestion that the police believe the suspect to be the offender.

CHAPTER THREE

The Rules and Commentary

Part I. Scope of Guidelines

Rule 101. Purposes

The purposes of these guidelines are:

(a) ***To Establish Uniform Procedures.*** **To establish uniform procedures for conducting pretrial eyewitness identifications of suspects.**

COMMENT

Present practices with respect to pretrial eyewitness identification procedures vary enormously from city to city in Canada. In some cities lineups are held in virtually every case in which identification is an issue. In other cities they are almost never held; photographic displays are used instead. (Compare Ottawa, for example, where between 150 to 200 lineups are held per year, with Hamilton where two or three are held annually.) In most cities lineups will normally be held if the offence is serious, but in others whether a lineup is held is within the discretion of the investigating officer.

The number of distractors used in lineups varies from city to city. In some cities, five distractors are normally used; in others, as many as twelve would constitute a typical lineup. Distractors are chosen off the street in most cities, but people in custody and police officers may also be used. If there is more than one suspect, they may be placed in one lineup or in several separate lineups. Sometimes photographs of lineups are not taken, because members of the public would not participate if they were. In most cities, however, colour or black-and-white photographs are taken

in every case. The police in some cities always require the suspect to don clothes different than those allegedly worn by the offender at the time of the offence, and attempt to disguise all distinguishing characteristics of the suspect; in other cities these things are never done. The above represent only a few of the ways in which pretrial eyewitness identification procedures vary from city to city. The tabulation of the answers to the survey of police practices in Canada, which is on file at the Law Reform Commission of Canada, reveals that the present police practice varies from city to city with respect to almost all aspects of the pretrial eyewitness identification procedure.

The need for uniformity in procedures springs, in large part, from the fact that these procedures are crucial to effective law enforcement and to the conduct of a fair trial. There would appear to be no reason why the procedural protections afforded the accused, and his or her ability to challenge such procedures, should vary from city to city. All accused persons in Canada are subject to one *Criminal Code*, which provides for police identification of arrested persons. It is incongruous for them to be subject to widely diverse identification procedures, all taking place under the general authority of the same *Code*.

(b) *To Increase the Reliability of Identifications.* **To ensure that eyewitness identification procedures are reliable. To this end, the guidelines permit the expeditious holding of identification procedures and assist in preserving the accurate recollection of witnesses.**

COMMENT

A primary purpose of eyewitness identification procedures must be to ensure that eyewitnesses will be able to identify the person they saw. Thus, for example, the guidelines that deal with how a description should be taken from an eyewitness attempt to ensure that this process does not impair the witness's ability to recognize the suspect subsequently. In cases of urgent necessity, such as where a witness is dying at the scene, a confrontation may be held even though this procedure is obviously suggestive.

These guidelines also attempt to ensure that if an identification is made it is as probative as possible — that a witness's identification is based only on his or her recollection of the offender's appearance. This is to ensure that no question can be raised at trial about the reliability of the identification procedure.

(c) *To Reduce the Risk of Mistaken Identification.* **To minimize the possibility of mistaken identification. To this end, the guidelines require that eyewitnesses attempt to identify suspected offenders in unsuggestive circumstances, and discourage them from identifying a person in an identification procedure simply because he or she is the person who most closely resembles the person they saw.**

COMMENT

One of the most important purposes underlying virtually all rules of criminal evidence and procedure is the protection of innocent persons from wrongful conviction. The State's interest, it is commonly said, is not in obtaining a conviction as such, but in obtaining the conviction of the guilty person. Coincidentally, the case in which the English Court of Appeal endorsed this idea was one dealing with the propriety of certain identification procedures employed by the police.[59]

It might be noted that in the area of eyewitness testimony, the risk of wrongful conviction is particularly insidious. The person likely to be mistakenly identified is one the police suspect of having committed the crime, and in many cases is likely to be known to the police by reason of previous charges or convictions. The people who suffer the greatest possibility of unjust conviction are those who have had previous contact with the criminal justice system.

The danger of mistaken identification is present in pretrial identification procedures because: (1) witnesses taking part in such a procedure are likely to expect that the police have a suspect; (2) if the witnesses are not completely confident about their ability to identify the person they saw, they will be anxious to identify the police suspect; and (3) there are numerous, often subtle ways that the identification procedure might be conducted or biased so that the witness is able to discern who the police suspect is.

The first danger giving rise to the possibility of mistaken identification is self-evident. If the police go to the trouble of staging an identification procedure (for example, a lineup), all witnesses are likely to correctly assume that the police have arrested or at least taken into custody a person that they strongly suspect is the offender.

Witnesses, unless they are absolutely confident about their ability to identify the offender, will feel some pressure to identify the police suspect. Most witnesses taking part in an identification procedure will be anxious to identify the suspect in order to discharge a public duty in solving a crime, vindicate the victim, appear cooperative to the police, or look intelligent.[60] In short, a whole range of factors contribute to the

witnesses' sense that they will have "failed the test" if they do not pick someone, preferably the police suspect, out of a lineup or other pretrial procedure.[61]

These two factors give rise to the dangers that the witness will be looking for manifest suggestions or latent cues from the police as to who the suspect is, or that in their zeal to "pass the test" they will simply pick out the most likely-looking person. The danger of suggestion is particularly serious in identification procedures, since the mind does not carry photographic reproductions of reality, but rather only fragmented and faded chunks of larger pictures, which are to some extent supplemented by interpretations of incomplete information. The influence of suggestion can cause people to superimpose the features of a currently-suspected person onto the faded memory images of faces they have seen in the past. This is particularly difficult to discern because witnesses are not ordinarily aware that their identification of a person may relate more closely to the effects of suggestion than to their original perceptions of the offender. Moreover, once their memory has been distorted by suggestion, witnesses will be unable to recall their original perception.

The guidelines, thus, attempt to minimize the risk of mistaken identification in an identification test by (1) reducing the witnesses' expectancy that the police have a suspect; (2) reducing the pressure on witnesses to identify someone; (3) ensuring that the identification takes place in circumstances as free as possible of any suggestion that might bias the witness towards the selection of a particular person. The rules are stricter in this respect than present police practices. It must be noted, however, that this should serve not only to protect persons from being wrongfully identified, but should also serve to ensure that identifications made are as reliable as possible — the second general purpose of these guidelines.

(d) *To Protect the Rights of Suspects.* **To ensure that the rights of any person identified are not prejudiced. To this end, the guidelines establish rules that will require suspects to be fully informed of the nature of the procedures and of their rights, and will permit pretrial identification procedures to be reconstructed at trial.**

COMMENT

Perhaps the two most serious defects in present police practices are the failures to ensure that (1) suspects are informed of their rights, and (2) the pretrial identification procedure is conducted in such a way that it can be reconstructed at trial so that the trier of fact can assess its influence on the witness's identification.

With respect to informing suspects of their rights, only Fredericton, Halifax and Sherbrooke routinely inform suspects of their right to counsel at the lineup. In the majority of cities the police report that although they cannot prevent counsel from attending the lineup, they do nothing to encourage it. In some cities they positively discourage it by threatening to subpoena lawyers as witnesses if they attend the lineup. Often, lawyers present at a lineup are not allowed to appear behind the one-way mirror in order to observe the procedure (in spite of the fact that the suspect is also unable to observe what is happening behind the one-way mirror). Any records made of the pretrial procedure are seldom given to the defence. Those that are made are given at the discretion of the Crown counsel. Confrontations and informal viewings are often held without the suspect's consent or knowledge.

Just as important as being informed of their rights is the suspects' ability to reconstruct the identification procedure at trial in order to expose any biases, if they are to have the in-court identification meaningfully evaluated. The concern about the difficulty at trial of reconstructing pretrial identification procedures was in large part responsible for the extension in the United States of constitutional safeguards to this stage of the proceedings.[62]

Although some records are kept of pretrial identification procedures in Canada, our survey of police practices revealed that police departments are not particularly sensitive to the need to conduct procedures in a fashion that can be reconstructed at trial. For example, informal procedures are often used in place of a more controllable procedure.

Under the proposed guidelines the accused's rights are protected, and the pretrial procedures will be capable of reproduction at trial. The judge or jury will be able to assess accurately any possible influences on the witness's identification. At the very least, a complete record of pretrial identification procedures will be available to the defence.

Rule 102. Definition of "Eyewitness Identification Procedures"

As used in these guidelines, "pretrial eyewitness identification procedures" refer to the following procedures:

(a) ***Taking Descriptions.*** **Taking a verbal description of a suspect from an eyewitness.**

(b) ***Preparing Artist's Drawings and Composites.*** **Preparing a non-photographic pictorial representation (e.g., a free-hand sketch or identi-kit composite) of a suspect from an eyewitness.**

(c) *Conducting Photographic Displays, Lineups, Informal Viewings, and Confrontations.* **Conducting a photographic display, lineup, informal viewing or confrontation in order to obtain an eyewitness identification.**

COMMENT

"Pretrial eyewitness identification procedures" refers to all pretrial procedures that relate to eyewitness identification.

Rule 103. Definition and Role of "Supervising Officer"

The officer who is responsible and has the authority for ensuring that a pretrial eyewitness identification procedure is conducted pursuant to these guidelines shall be known as the "supervising officer". If at all possible, the supervising officer should not be otherwise involved in the investigation or prosecution of the case.

COMMENT

Throughout these guidelines it is necessary to refer compendiously to the police officer in charge of conducting an identification procedure. A "supervising officer" need not be an officer of any particular rank, but simply the officer in charge of conducting the procedure. Police departments should establish a practice relating to how supervising officers will be designated in particular circumstances.

The responsibilities of the supervising officer include notifying the witnesses and the suspect of the procedure, selecting a location for the procedure and distractors for a lineup or photographic display, appointing assistants, and ensuring that all the necessary records are kept. In ensuring that the guidelines are followed, the officer will have the authority to maintain order at the identification procedure, and may, for example, exclude any person, including counsel for the person to be identified, if he or she disrupts the identification.

Obviously, the supervising officer should be familiar with the law and practice of pretrial identification procedures. He or she should also be familiar with psychological research evidence and theory relevant to the practice of pretrial identification procedures.

The guideline provides that normally the supervising officer should not be involved in the case. This practice will remove suspicions of unfairness and perhaps any temptation on the part of the officer,

consciously or unconsciously, to assist the witness in identifying the police suspect. This is a common prohibition in guidelines regulating lineups both in Canada and abroad.[63] Indeed, to avoid all suspicion that the investigating officer influenced the lineup, he or she should not be present at the identification proceeding, unless the suspect's lawyer is present.[64]

It has been suggested that in order to avoid biased lineup proceedings, they should be supervised by a magistrate or other judicial officer. This is the practice followed in India, where magistrates supervise the conducting of lineups.[65] Not only do police not conduct lineups in India; their presence is discouraged.[66] The rationale for this is based not only upon a concern about assistance the police might consciously or unconsciously provide to witnesses,[67] but also upon a concern for the need to maintain the appearance of justice.[68] Italy is another country in which the police do not conduct lineups or confrontations. They may be held only by a magistrate, before whom the police must bring the arrested person within forty-eight hours of making an arrest.[69] In France, members of the *police judiciaire* direct lineups, with the possibility of judicial supervision by the *juge d'instruction* (investigating magistrate). Although the conducting of the lineup precedes the beginning of the *juge d'instruction's* duties, there is no objection to his or her supervision of the lineup since he or she must eventually compile the dossier of the case and assess the evidence obtained, and in fact he or she is often present.[70]

In the United States a number of courts have undertaken to supervise identification procedures. Normally this is done by having the eyewitness attend the accused's first appearance at court or arraignment, and by asking him or her, under the judge's supervision, to identify the offender from persons in the courtroom, including an array of persons similar in appearance. In its recently-published *Code of Pre-Arraignment Procedure*, the American Law Institute did not provide for this practice in all cases, but the provisions were made compatible with such a practice in the event that a jurisdiction wished to experiment with it.[71]

There are obvious advantages to having pretrial identification procedures supervised by a magistrate or independent judicial officer.[72] Prohibiting the presence of police officers at lineups is likely to result in less pressure on witnesses to make an identification of someone about whom they are unsure. Having a judicial officer present might also remove the need for the presence of defence counsel. However, aside from the problem of obtaining suitable judicial officers, taking away from the police the responsibility for pretrial identification procedures would appear to be too drastic a response. The police guidelines established here, subject to judicial scrutiny, should amply provide for the fair conduct of procedures.

Present Practice

See the discussion of present practice under the next guideline, the definition of "Accompanying Officer".

Rule 104. Definition and Role of "Accompanying Officer"

An "accompanying officer" is any officer who accompanies witnesses when they view a lineup or a photographic display or take part in an informal viewing. If at all possible, the accompanying officer shall not be otherwise involved in the investigation or prosecution of the case and shall not know of the identity of the suspect, if there is one.

COMMENT

For the same reasons that the supervising officer should not be someone who is otherwise involved in the investigation or prosecution of the case, neither should the officer who actually presides over the making of an identification. However, it is also important that when identification tests are conducted, the officer who actually shows the witness the lineup, photographic display or informal viewing does not know who the suspect is.

If the person conducting the identification test knows who the police suspect is, he or she might communicate this knowledge to a witness.[73] Of course, only a dishonest police officer would reveal the suspect's identity by an explicit act. However, recent psychological studies have shown the dramatic effect of "experimenter bias", the "self-fulfilling prophecy" or the "Rosenthal effect", as it is variously called. The essence of this concept is that a person's expectations, predictions or hopes of another's behaviour are often realized. In the context of psychology experiments, the experimenter's expectations are unintentionally communicated to the subjects in subtle ways, so that there is a danger that the experimenter will obtain the expected results.[74]

It is very easy to see how this phenomenon might apply in the lineup situation. If the officer conducting the lineup knows who the suspect is, there is a danger that he or she may, albeit unknowingly, transmit this knowledge to the witness. The witness may act on this information and thus choose the "expected suspect". Indeed the danger of "experimental bias" is particularly likely to be present at a lineup because a witness will be anxious to choose the police suspect since police officers command respect and are authority figures for most persons.[75]

Thus this rule for conducting pretrial identification procedures, that the accompanying officer should not know who the suspect is, has its

counterpart in scientific research. In well carried out psychological experimentation, the experimenter is kept "blind" to the experimental manipulation when there is a possibility of bias — the experimenter is not made aware of the hypothesis being tested.[76]

Although the manner in which the experimenter's bias or expectation is communicated to the subject is still somewhat obscure, it is easy to imagine ways in which a police officer might unintentionally "tell" a witness who the suspect is. For example, a suggestion might be conveyed by the manner in which the photographs are handed to the witness for inspection. The officer conducting the proceeding might become tense when the witness examines the photograph of the suspect, or the officer might allow the witness more time to examine one photograph than another. In a lineup, the officer might inadvertently rest his or her eyes on the suspect during the proceeding, or unconsciously ask the witness questions or give them directions that might reveal who the suspect is.

Notwithstanding the theoretical preference for keeping the accompanying officer ignorant of the identity of the suspect, such a rule might be impossible to follow in some cases because a sufficient number of officers may not be available. In most cases it will necessitate the participation of at least one additional officer in the arrangement and conducting of an identification procedure, since not only will the accompanying officers have to be uninvolved in the investigation of the case, but they will not be able to take part in the preparation of the procedure.

Moreover, other guidelines require that suspects be given the choice of taking any position in the lineup they wish, and that they be asked, before the witness enters the viewing room, whether they have any objections to any of the other participants or any other aspect of the proceeding. Obviously, if an accompanying officer is to remain blind to the suspect he or she would not be able to perform this task.

More seriously, where there is more than one eyewitness, a strict application of the rule would require the accompanying officer to be replaced after each viewing at which a witness made an identification. It might be possible to arrange for the witness to write a number on a piece of paper signifying the position of the person identified, so that the accompanying officer would be kept ignorant of the person identified. However, such a practice would not only be subject to undetectable error, but would also conflict with the requirements of other guidelines that require witnesses who identify a person to be asked some simple questions relating to both the certainty and basis of their identifications. This would not be possible in multiple-witness cases if the accompanying officer had to be kept ignorant of the identity of the suspect unless, of course, different accompanying officers were substituted after each witness.

Despite such practical difficulties, in most cases there should be few difficulties in arranging the identification procedure in such a way that the accompanying officer is unaware of the suspect's identity. For example, the accompanying officer can simply be called in to accompany the witnesses once the process of forming the lineup has been completed.

Present Practice

In most cities the police attempt to ensure that the investigating officer does not take part in the conducting of the lineup. Indeed, in London, they make a point of not having the investigating officer in the building. In Montréal, Calgary, Fredericton and Regina, the lineup is almost always conducted by the investigating officer. Only in Vancouver did the police report that normally the officer who actually conducts the lineup would be unaware of the suspect's identity.

Although in most cities the investigating officer is not present at the lineup, in virtually all cities the investigating officer conducts photographic displays.

Rule 105. Restrictions on Eyewitness Identifications

No police officer shall attempt to secure the identification by an eyewitness of any person as a person involved in a crime unless the pretrial eyewitness identification procedures established by these guidelines are followed or unless for one of the reasons provided in Rule 107, such a procedure is unnecessary.

COMMENT

This rule establishes the primacy of these proposed guidelines. No sanction is provided in the rule for police officers who violate the guidelines. The sanction, which will eventually have to be inserted in the rule, will depend upon the form that the guidelines take. For example, if the guidelines take the form of police rules of practice, police departments will provide for their normal disciplinary actions when the rules are breached. For those guidelines that take the form of a statutory enactment, if a general exclusionary rule is adopted it might provide that evidence of a pretrial identification may be excluded at trial unless the guidelines have been at least substantially followed. The next rule, Rule 106, provides a sanction if a pretrial identification procedure is not held at all.

Rule 106. Prerequisite to Trial Identification

No eyewitness shall identify the accused at trial unless he or she has identified the accused at a pretrial eyewitness procedure or unless for one of the reasons provided in Rule 107, such a procedure is unnecessary.

COMMENT

This rule prevents the police from not holding a pretrial identification procedure, simply waiting until trial and having the witness identify the suspect in the courtroom.

Nothing is more unfair to an accused who claims that he or she is not the person who committed the crime than for the prosecution to wait until trial to ask the eyewitnesses to look about the courtroom and point to the offender. (This procedure is commonly referred to as a "dock identification".) The accused at this point is usually seated alone in the prisoner's dock or at the defence counsel's table, and is by far the most noticeable person in the courtroom. Even when the accused is permitted to sit in a less conspicuous place such as the public gallery, the identification procedure is unsatisfactory.

In effect, an in-court identification is similiar to a pretrial confrontation if the accused is conspicuous in the courtroom. It is similar to a pretrial informal viewing if the accused is seated inconspicuously in the courtroom along with the members of the public. The comment following Rule 505, the rule that deals with holding a lineup, explains why a lineup is always preferred to either of these procedures. The same reasoning would imply that a pretrial lineup is always to be preferred to an in-court identification. Indeed, if a lineup cannot be held for one of the reasons enumerated in Rule 501, a pretrial confrontation or informal viewing is likely to be better than an in-court identification. Once the accused has been brought to trial, the pressures on eyewitnesses to identify the accused as the person they saw are almost overwhelming. Obviously the police and prosecution strongly suspect the accused; they have gone to a great deal of trouble in bringing him or her to trial; and, if the witness cannot identify the accused, he or she will have to state so publicly. Furthermore, a witness in court is probably suffering from more anxiety than a witness at a pretrial procedure, and is therefore less likely to make an accurate identification. In addition, if an identification is not made until trial, there is a danger that the identifying witness might see the accused in the custody of a police officer at the time of arraignment, or consulting with a lawyer prior to trial.

Under the present law, there is no legal requirement that an eyewitness must identify the accused at a pretrial identification procedure. An in-court identification is admissible evidence of identification. However, the courts have recognized the danger inherent in an in-court identification,[77] and have consistently stated that, as a rule of prudence, the police ought not to rely upon an in-court identification as the sole means of linking the accused to the crime.[78] Indeed, some courts have held that it is a reversible error if there is no pretrial identification procedure and the trial judge does not warn the jury specifically about the dangers surrounding a dock identification.[79] Moreover, in a number of cases even though a warning is given, appeal courts have held that because of the general weakness of the prosecution's case, an in-court identification was insufficient evidence to sustain a conviction.[80]

To some extent the dangers of a dock identification can be lessened by having the accused sit in the public gallery in the courtroom. However, the cases have held that whether the accused should be able to sit in the public gallery until identified by an eyeitness is within the discretion of the trial judge.[81]

Rule 107. When Procedures Established by Guidelines are Unnecessary

A pretrial eyewitness identification procedure as required by these guidelines may be unnecessary in the following circumstances:

(a) ***Inadequate Recollection.*** **The witness would be unable to recognize the perpetrator of the offence being investigated. However, if the person is a potential eyewitness, this shall be recorded, along with any relevant information as provided in Rule 206.**

COMMENT

There would obviously be little point in requiring persons who assert that they could not identify a suspect to attend an identification test. However, evidence that an eyewitness to an alleged crime asserts that he or she could not identify the perpetrator is often relevant. For example, such evidence might be relevant in assessing the weight to be given to the testimony of another eyewitness who purports to be able to identify the suspect, but who was in a situation similar to that of the eyewitness who cannot make an identification. Therefore, a record containing information

relating to the potential eyewitness should be prepared, as required in Rule 206.

(b) *Prior Knowledge.* **The witness knew the identity of the suspect before the offence occurred (e.g., the suspect was a personal acquaintance, relative, neighbour, or co-worker).**

COMMENT

Another clear exception to the general rule that a witness should be asked to attempt a pretrial identification of the accused arises when the witness is acquainted with the accused. A lineup or other pretrial identification proceeding would in these circumstances serve no useful purpose. It would only test the witness's ability to identify an already-familiar face. For example, if a woman accused her estranged husband of assaulting her on a dark street corner, there is a possibility that the victim was mistaken in her recognition of the assailant. However, this error will not be detected in a lineup, since the wife will be able to pick out her husband with no difficulty. Similarly, the witness's identification will not be biased by the police's bringing her husband before her and asking whether he is the man who assaulted her. All pretrial identification would prove in these circumstances is that the wife could identify her husband. This is hardly probative of any of the matters likely to be in dispute at the trial.

Naturally, there will be cases where there will be some doubt as to whether the witness was sufficiently acquainted with the suspect to dispense with the need for a pretrial identification procedure.[82] Basically, the test should be whether the witness was sufficiently familiar with the suspect that he or she could not be mistaken about the suspect's identity.

Case Law

Since the courts do not insist on a pretrial identification, there is no clearly-defined exception under the present law for cases where the eyewitness has had some prior association with the accused. However, from reported cases, it is clear that under the present practice, usually no pretrial identification procedure is followed in such instances, and the courts have not commented adversly on this practice.[83] Also, if a pretrial identification procedure has been improperly conducted, such as where the witness is shown a single photograph of the suspect, the courts have indicated that this is not a serious error when the witness had prior knowledge of the suspect.[84] Furthermore, in noting the importance of an unsuggestive pretrial identification procedure, the courts often expressly exclude the case where the suspect was previously known to the

witness.[85] Finally, in cases where appeal courts have quashed convictions because of the frailty of eyewitness evidence, the courts often note the fact that the witness had never seen the offender before the commission of the offence.[86] The courts clearly draw a line between the considerations appropriate for cases where the witness was previously acquainted with the suspect and those where this was not so.

The courts have, however, quite properly distinguished between the frailties in the initial identification, and dispensing with the need to conduct a pretrial identification procedure if the witness asserts that an acquaintance is the offender. Owing to the frailties of perception, eyewitnesses might well be mistaken in asserting that it was a prior acquaintance they saw. Thus, even though the witness and accused were well known to each other, the trial judge may caution the jury that the initial recognition may have been erroneous.[87] Further, in England the mandatory common-law rule that the trial judge must give a warning to the jury, pointing out the dangers of mistaken identification, has been held to apply even to cases where the witness was acquainted with the suspect.[88]

Present Practices

All police forces, except in Ottawa, report that they would not hold a lineup if the witness had prior knowledge of the suspect.

(c) ***Independent Identification.*** **The witness, without police assistance, learned of the identity of the suspect after the offence occurred (e.g., the eyewitness recognized the suspect's picture in a newspaper or spotted the suspect at his or her place of employment).**

COMMENT

Witnesses will sometimes by chance see a person whom they identify as the offender; for example, they may see the person on the street or a picture of him or her in a newspaper. One of the important purposes of these rules is to ensure that, when the police conduct a pretrial identification procedure, it is conducted in the most reliable and fairest manner possible. Obviously, if a witness identifies, or learns of the identity of, the person he or she saw prior to an identification procedure, the police cannot exercise any control over that identification (to ensure that it is not suggestive) and the guidelines cannot be applied.

The mere fact, however, that an eyewitness sees, without police assistance, a person he or she thinks is the offender, is not enough to

make an identification procedure unnecessary. The witness must be able to identify that person. For example, if a witness identifies a person sitting in a bar as the person who committed an assault one week earlier, and the police arrive at the scene before the person leaves, there will be no need for any further pretrial identification test by that witness. Indeed, an identification procedure would be meaningless since the witness would presumably simply pick out the person seen in the bar.[89] However, if the witness merely catches a glimpse of the alleged offender getting into a car, and copies down the car's licence number, should the witness later be asked to attempt an identification of the offender at a lineup? On the one hand, the danger of conducting a lineup would be that the witness might identify the suspect not necessarily because he fits the appearance of the offender, but because he fits the appearance of the man the witness saw getting into the car. If this is the true basis of the witness identification, the lineup is valueless. Worse yet, if the jury does not understand the actual source of the identification (when the suspect was seen getting into the car), the results of the lineup may acquire an undeserved legitimacy. On the other hand, if the witness did not get a good look at the person getting into the car, and is not positive it was the offender, it would be dangerous not to subject the witness to some form of pretrial identification testing. Therefore, this might be a case where a lineup should be held; although the witness was able to direct the police to a suspect, he or she had not "learned the identity of the suspect" without police assistance as required by the guidelines.

Where a witness selects a suspect independent of police assistance but, for example, might not have gained a clear view at that time of the suspect and, therefore, a lineup is held, a few additional precautions might be called for. For example, the conduct of any pretrial identification proceeding might be delayed at least one week from the time the witness claims to have seen the offender. This delay should lessen the extent to which the witness concentrates upon his or her image of the suspect rather than the actual offender. It should have little effect on the witness's recall of the original event, since studies show that the memory of faces tends to deteriorate slowly.[90] Also, the witness should be specifically told, before viewing the lineup, to look for the person whom he or she saw committing the offence, and not the person seen subsequently. Finally, the trial judge should instruct the jury about the special danger of misidentification in such circumstances.

Case Law

Again there is no clearly-developed jurisprudence on the issues raised by this provision, since there is no firm rule under the present law that a pretrial identification procedure is essential; however, the concerns expressed by judges support this exception. For example, in *R.* v.

Racine,[91] an independent identification was made when the witness recognized a photograph of the accused in a newspaper, *Photo-Police*. Even though viewing a photograph of a "wanted" person is clearly suggestive, and no subsequent lineup was held in the case, the court dismissed the accused's appeal because, among other things, it was "not a case of the police showing the victim a package of photographs and saying 'pick one'."[92]

In an Australian case[93] both the police and the court recognized the dangers mentioned above. The victim in the case thought she recognized her attacker three weeks after the event and gave the police the licence plate number of the motorcycle she saw him on. A lineup was subsequently held, although the facts do not indicate the time lapse. The court dismissed the accused's appeal but nonetheless revealed an appreciation of the problem presented when a witness sees the accused between the time of the offence and the lineup: "It is obvious, however, that her identification of the man must have been based upon her inspection of him at the railway gates, as much as, if not more than, upon her opportunities of seeing her assailant."[94]

(d) *Continued Observation.* **The witness maintained surveillance of the suspect from the time of the commission of the offence to the time of the suspect's apprehension.**

COMMENT

If an eyewitness observes a person committing a crime and the person is apprehended in the presence of the witness, an identification procedure is obviously unnecessary.

(e) *Identity Not Disputed.* **The accused does not dispute the issue of identity.**

COMMENT

In many cases identification will be admitted by the accused, and some other element of the offence will be in issue. In these cases, a pretrial identification procedure is a needless formality. The difficulty lies in determining the cases in which the procedure should be dispensed with. Even if the accused were to make an admission relating to

identification before trial, there is nothing preventing him or her from subsequently disputing the issue at trial. Unless some formal procedure for taking such an admission is established, perhaps the police should be required to conduct a pretrial identification procedure in all serious cases. This is currently the practice of some police departments. In this case a rule would presumably be required, making identification procedures unnecessary for less serious offences.

Rule 108. Modification of Guidelines in Special Circumstances

If it is necessary in special circumstances to obtain an identification that might otherwise not be obtained, these guidelines may be modified, provided there has been as full a compliance as is practicable.

COMMENT

An eyewitness identification is often the most important, and in some cases, the only evidence tending to prove the accused's guilt. Therefore, if these cases are to be resolved justly, the evidence must be admitted. However, in some cases it may not be possible to obtain an identification according to the strict application of these guidelines. In such cases this rule permits these guidelines to be modified on an *ad hoc* basis. The importance of an identification can, in some cases, justify an identification procedure that is suggestive and which cannot be controlled if no reasonable alternative exists. This guideline is an acknowledgement of the fundamental interest in law enforcement, and the fact that the most that the court can ask of law enforcement officials is the production of the best evidence.

Even in these cases, the rules should be followed to the extent possible to maximize the integrity of the law enforcement process. The advice of a legally-trained and disinterested person — the police department's legal adviser — should be obtained, if possible.

There is a danger that the courts might use a rule such as this simply to superimpose their own standards of a properly-conducted pretrial identification procedure on the police. However, these guidelines are sufficiently detailed that the probability of their being essentially overridden by the courts seems remote.

Rule 201. Separating Witnesses

When there is more than one witness, they shall not take part in a pretrial eyewitness identification procedure in one another's presence.

COMMENT

Each witness's identification evidence should be the result of independent judgment. If witnesses view a lineup together, there is a risk that those who are in some doubt about whether a particular lineup member is the offender may simply agree with another witness who identifies a suspect. There is also a risk that a group of witnesses, all of whom might be in some doubt about the identity of the suspect, will aggregate their suspicion against a particular person, and come to a collective judgment about who the suspect might be. Thus, through a process of mutual reinforcement, a number of uncertain individuals could convince themselves beyond any doubt that a particular member of the lineup is the criminal.

The practice of having witnesses view the suspect in one another's presence is particularly dangerous since jurors are more inclined to convict an accused who has been identified by more than one witness. Their view might be that while one witness may be honestly mistaken, it is unlikely that several people would make the same mistake (although one is reminded of the cases in which ten or more witnesses identified a person who after conviction was found to be innocent).[95] However, it is clear that where one witness positively identifies the accused and several other witnesses resolve their doubts by concurring in that judgment, whatever safety may be found in numbers is eliminated. All but one of the identifications would be tainted by suggestion, and the trier of fact would only be able to speculate as to whether the other witnesses would have also identified the accused, if left to make their choices independently.

A number of psychological experiments dealing with group pressure and conformity support the view that people will frequently abandon their individual judgment in order to conform to group judgments. One of the most notable experiments in the area was conducted by Solomon Asch.[96] Briefly, in this experiment subjects were asked to differentiate lines of obviously different lengths. Unknown to the true subject, people giving "wrong" answers to the question were confederates of the experimenter.

Asch found that a large number of the true subjects modified their views to conform to the opinion of the confederates, and thus gave the wrong answer.

Although the above argument was cast in terms of the dangers arising at a lineup, the pressure to conform to group judgments, and people's basic instincts to create a harmonious atmosphere would obviously be present in any pretrial identification procedure. Thus, witnesses should not give descriptions, take part in reconstructing pictorial representations, view photographic displays, nor take part in confrontations or informal viewings in one another's presence.

It has been suggested that more than one witness should be entitled to view the same lineup at the same time, provided that they do not in any way communicate. The witnesses could, for example, be instructed to write down the number worn by the person whom they identify.[97] Several practical concerns, however, mitigate against allowing witnesses to view lineups together, even under these conditions. First, although witnesses may be instructed not to speak, it will be difficult to control spontaneous outbursts. Second, some witnesses may wish to examine a particular lineup participant more closely. Third, witnesses who, for example, pay inordinate attention to a particular person, may thereby communicate their selection to the other witnesses. Finally, it would not be appropriate to ask witnesses questions as to the certainty or basis of their identification, as required by Rule 205, in the presence of other witnesses, for again, the pressure to conform would be present. Some police stations have individual cubicles from which a number of eyewitnesses can view a lineup at the same time. Since the witnesses are out of one another's presence in such circumstances, this practice would not be prohibited by the guideline. Of course, care would have to be taken to ensure that questions asked of individual witnesses relating to such matters as the basis and confidence of their identification not be overheard by other witnesses.

Case Law

The courts have not consistently condemned the practice of allowing witnesses to undertake pretrial identification procedures in each other's presence.[98] But in at least one case, *R.* v. *Armstrong*,[99] the court clearly revealed an awareness of the dangers of not separating witnesses at identification procedures. In this case, the three witnesses were left together at the police station to look through a book of photographs. This practice was strongly criticized by DesBrisay C.J.B.C.:

> I would add that it is most objectionable to provide books of photographs for inspection by more than one person at a time. This gives opportunity for discussion between the persons examining photographs, and it may well happen that the one who is uncertain in his identification, or who is unable to

identify, may be influenced or persuaded by what appears to be the confidence or certainty of another person. Each witness should be required to make his own inspection and selection, if any, and to reach his own conclusion, without the opportunity for consultation or discussion with any other person....[100]

Present Practice

In all the cities surveyed, except three, the police reported that witnesses view lineups separately. In two of these cities it would appear that witnesses frequently view lineups together. In Vancouver, although witnesses view the lineup at the same time, that city has facilities enabling eight witnesses to view a lineup from separate cubicles, so that they are unable to observe one another.

Rule 202. Avoiding Witness's Suggestions

A witness who has taken part or who might take part in a pretrial eyewitness identification procedure shall be instructed not to discuss the suspect's appearance with other witnesses. If possible, witnesses shall be escorted in such a way that they do not encounter one another before or after engaging in a pretrial identification procedure. If witnesses are together, a police officer shall be present, to ensure that they do not discuss the suspect's appearance.

COMMENT

This rule is necessary to protect the integrity of Rule 201. There would be little point in ensuring that witnesses take part separately in identification procedures if, before or after the procedure, they could confer with one another. Although the dangers posed by collaboration are greatest after a witness has taken part in an identification procedure and has identified a suspect, they are also present if collaboration takes place prior to an identification. Witnesses who confer with one another prior to an identification might attempt to tailor their reports to reflect a consistent story, or some witnesses might simply yield to the descriptions of the suspect given by others.

Psychological experiments confirm that if witnesses are allowed to consult with one another prior to an identification, their reports will be more homogeneous. Although their reports will also be more detailed, their composite report (in effect) will be more unreliable than their individual descriptions.[101] For example, in one study,[102] the authors presented a staged purse-snatching incident to unsuspecting subject-witnesses, then asked them to complete questionnaires regarding the details of the incident. Subsequently, the individual witnesses were put

into groups and asked to complete the questionnaire together. The authors found that although the questionnaires completed by individuals tended to be less complete, with respect to the answers completed, the groups tended to make 40 per cent more errors than the individuals. The influence of others in this regard is likely to be especially strong in novel and ambiguous situations, such as that experienced by an eyewitness to a crime.

Ideally, witnesses should be physically separated from one another. Where it is impossible to keep the witnesses separated prior to viewing a lineup, the guidelines suggest that a police officer be stationed in the waiting room to ensure that the witnesses do not discuss the matter of identification.

The guidelines provide that witnesses should be cautioned against discussing the suspect's appearance with one another. However, when witnesses are associated by such things as marriage or place of employment, this caution may be of little effect. In these cases, it is particularly important that identification procedures take place as soon as possible, and that witnesses take part in the identification test at approximately the same time. This will prevent one witness from describing to another the appearance of a person whom he or she had previously identified.

This rule attempts to prevent witnesses from conferring with one another about their identification evidence. However, in the event that they do, a number of subsequent rules attempt to remove all possible dangers that might result; see for example, Rule 505(8).

Case Law

From the reported Canadian cases it is clear that under the present practice, witnesses often communicate with one another. The courts have not been critical of this practice; even in particularly blatant situations, the courts have not only failed to emphasize that the police should caution witnesses not to discuss the appearance of the suspect among themselves, but they have also failed to criticize the police for not separating witnesses at a pretrial identification procedure.[103]

One country where the courts have been particularly vigilant in commenting on the police practice of permitting, or even giving the opportunity for, witnesses to confer with one another is South Africa. In *R.* v. *W.*[104] for example, where witnesses were assembled together in one room prior to the lineup and admitted to having described the assailant to each other, the court commented:

> One appreciates that the police personnel and accommodation available will not always permit of the isolation of each witness; but they should, if they are

assembled together, at least be instructed by the police not to discuss the matter of the identity of the person sought for, and a member of the force, if available, should be present to see that such instruction is not infringed.[105]

In another case[106] a number of irregularities were committed at the lineup, but the court noted that the most important of them was the practice "of herding the witnesses together in a room without supervision or control, without warning not to discuss, and in circumstances where they had every opportunity of exchanging notes as to the appearance of the accused."[107]

Interestingly, in Italy the practice of separating eyewitnesses is considered so important that it is codified in the *Code of Criminal Procedure*. The Code provides that each witness must make a separate private identification and that the judge must ensure that those witnesses who have viewed a suspect do not communicate with those who have not yet made an identification.[108]

Present Practice

Virtually all our police respondents reported that steps are taken to ensure that, after viewing a lineup, witnesses are kept separate and apart, and that there is no chance for witnesses to converse with one another after the lineup is complete. Most police departments provide for witnesses to leave the viewing room by way of a special exit. This prevents those witnesses who have viewed the lineup from communicating with those who have not.

In most cities it would appear that witnesses assemble in the same room prior to viewing the lineup, but an officer is often present to ensure that the witnesses do not confer with one another.

Rule 203. Avoiding Police Officer's Suggestions

Police officers shall not by word or gesture suggest to any witness who they think the suspect is. If they must confront the witness with a suspect, they shall do so in a way that minimizes the appearance of their degree of belief in the suspect's guilt. A police officer shall not say anything to the witness during or after the proceedings that suggests that the witness correctly described or identified the suspect.

COMMENT

For the reasons discussed above, witnesses will invariably be looking to the police officers for cues as to whom the officers suspect. This gives

rise to two dangers. First, witnesses unable to identify the offender based upon their own independent recollection, might do so in order to be helpful to the police, believing that the police would only suspect someone if they had other evidence indicating his or her guilt. Second, witnesses whose original perception or present recollection of the offender's appearance is incomplete will tend to fill in the missing details unconsciously and, when their attention is directed to a particular person there will be a strong inclination for the witness to draw from that person the missing details. The effect may be to make the witness's image of the offender's appearance conform to that of the suspect.

The first sentence of this proposed guideline simply provides, as a general rule, that the police shall not in any way suggest to the witness the identity of the suspect. Subsequent guidelines attempt to prevent the danger that the police will unintentionally suggest to the witness who the suspect is. They provide, for example, that the presiding officer should not be aware of the identity of the suspect.

The second sentence of the guideline provides that in those cases where the police have to inform the witness of whom they suspect, namely, in those instances where a confrontation is permissible under these rules, they should minimize the appearance of their degree of belief in the suspect's guilt. The dangers of suggestion are great in a confrontation; however, if the police were also to inform the witness that they caught the suspect in possession of incriminating evidence, or that strong circumstantial evidence pointed to the suspect's guilt, or even that the suspect had been charged with the offence (although in some cases this will be obvious), the pressures on the witness to identify the suspect as the person they saw would be even more overwhelming.

The guideline also provides that police officers shall not say anything to the witness during or after the proceedings which suggests that the witness correctly described or identified the suspect. If witnesses are uncertain about their identification of the person they saw, anything that the police might say to them to indicate that they picked the "right" person might improperly increase their confidence that they accurately picked the person they saw. This might lessen the likelihood that they will subsequently go through a process of self-examination in trying to decide whether they correctly identified the offender, and might affect their demeanor and testimony at trial. It is important, therefore, that after the witness has made a selection at an identification test nothing be said or done by the police to indicate whether the witness's selection confirmed their suspicions. Indeed nothing should be said to the witness to indicate that there was a "right" or "wrong" answer. This problem should not, of course, present itself if the accompanying officer is not aware of the identity of the suspect, as suggested in Rule 104.

The courts are particularly vigilant in recognizing situations in which the police have suggested the identity of the suspect to the witness, and they invariably condemn the practice in the strongest terms. For example, in *R.* v. *Opalchuk*[109] the police officer conducting the identification procedure told one witness that the group of photographs he was given to examine included a photograph of a person they were suspicious of. The same police officer said to another witness: "Take a look at this one here; that's the one the other people picked out."[110] The trial judge, in acquitting the accused, was vehement in his criticism of the prosecution's identification evidence: "What weight, what value, what sufficiency can I attribute to this type of evidence in view of the manner in which the photographs were used?... Can it be said for a moment that the identification was absolutely independent?"[111]

In *R.* v. *Bundy*[112] the court called the police's action of telling a witness that a particular person in the lineup resembled the man the police suspected, "extremely improper".[113]

There are no reported Commonwealth cases in which the court has criticized the police for thanking a witness for being helpful after an identification procedure. However an American court mildly criticized an officer for telling a witness that she had "done well" following her identification of the accused.[114] The court said: "There is no reason to suppose that the detective's remark was more than a comforting gesture to a witness, who was, quite naturally, on edge. It was better left unsaid, but does not seem to us to be the kind of action that materially affected her certainty as to the identification."[115]

Rule 204. Inviting Witnesses to Attend

When inviting witnesses to attend a pretrial identification procedure, the police shall only suggest that they have a possible suspect.

COMMENT

The purpose of this rule is to try to reduce the witnesses' expectation that the police have a suspect they would like them to identify. Witnesses should be instructed in such a way as to reduce whatever pressure there is on them to pick out the "right" person; namely, the person the police suspect. In particular, the police can make it clear that they are not certain their suspect is the offender.[116]

Present Practice

The police forces in some of the cities surveyed used the following wording in inviting witnesses to attend lineups: Victoria — "We request you attend at police headquarters to view a line-up of possible suspects concerning the crime in which you were the victim." Calgary — "You are requested to view a line-up to determine if you can make an identification regarding the matter at hand (we never say we have a suspect or an accused)". Edmonton — "We advise them that we have a possible suspect in the crime and the purpose and procedure of the line-up is described to them." Saint John — "A witness is asked if they would view a police line-up in an effort to identify a possible suspect in a criminal investigation we are conducting." Halifax — "We are arranging a line-up. Would you look at it to determine if you can identify the person responsible for the crime." Montréal — "We tell the witness we have a suspect and we need him to see if the suspect really is the person involved in the event he witnessed." Sherbrooke — "A suspect has been arrested and he is asked to come to the station to identify him."

Rule 205. Instructing Witnesses

When conducting a procedure that requires witnesses to attempt to identify the person they saw from a group of people (or photographs), the accompanying officer shall instruct the witnesses:

(a) ***To Study.*** **To take their time and to cast their minds back to the witnessed event, and to examine carefully all participants (or photographs) in the lineup (or photographic display) before identifying anyone as the person they saw.**

COMMENT

This instruction will prevent careless and overly anxious witnesses from choosing the first person who bears even a vague resemblance to the offender. If a lineup is assembled carefully, the participants will bear a close resemblance to one another; a fact witnesses may grow to appreciate only after studying each participant.

However, the instruction has a more subtle purpose. Even though the police may inform witnesses that they can take as long as necessary, the reality of the situation is such that witnesses will likely feel that they have to make a quick identification, in order to appear to be "good" witnesses.

Psychological studies have shown that if subjects attempt to make hasty identifications, their decisions are more likely to be incorrect than if

they take their time.[117] The results of these studies are consistent with the common experience of struggling to recall or recognize items from long-term memory, and often only after several minutes of effort suddenly being able to make the correct choice.

Thus, it is crucial that witnesses be made to feel that they have ample time to make an identification. In view of their likely perception of the situation, a simple instruction to them to "take your time" is unlikely to convince them that the accompanying officer is sincere in this respect. Asking them to perform a specific task, "to cast their minds back to the witnessed event" and to carefully examine each participant, is a more effective way of ensuring that they do not make hasty decisions.

The instruction "to cast their minds back to the witnessed event" is designed to serve another purpose. There is some evidence that if witnesses are invited to recall and reinstate the context of the witnessed event, accuracy will be enhanced.[118]

(b) *To Exercise Caution.* **That it is very easy to make mistakes in identifying people and therefore to exercise caution in identifying someone.**

COMMENT

Considerable attention has been focussed on what warnings judges ought to give juries about the inherent frailties of eyewitness identification.[119] No study has been devoted to the question of whether mistaken identifications can be avoided by warning witnesses about the general weaknesses of human perception and memory.[120] But if one of the causes of witness error is the over-confidence people have in their ability to identify faces, such an instruction may cause witnesses to make a more careful and accurate identification. Moreover, if they are cautioned, they will be less likely to view a failure to identify a suspect as a personal failing.

The exact wording of the caution is problematic. The accompanying officer might caution witnesses that there are a number of known cases in which innocent people have been convicted and imprisoned upon the strength of honest but mistaken identification by eyewitnesses, or that psychologists have repeatedly demonstrated in scientific studies that even the most attentive and perceptive people are prone to error. The major objection to cautions of this nature would be that, if too strongly worded, they might unduly inhibit witnesses from making an identification. Therefore, the suggested caution is a simple and straightforward warning about the dangers of eyewitness testimony.

Present Practice

Most police forces report that they do not give witnesses any special caution about the dangers of false identification; they cannot see any point to it, and it might alarm witnesses, causing them not to make an identification at all.

(c) ***That the Person May Not Be Present.*** **That the police do not strongly suspect anyone of the crime and that the person they saw (or his or her photograph) may not be present.**

COMMENT

A desire to discharge a public duty, revenge a crime, or appear to the authorities to be an intelligent and co-operative witness all undoubtedly contribute to the witnesses' sense that they will have failed the test if someone is not picked out of the lineup. The response of many people who are faced with such a challenge to their abilities will be to point out the person or the photograph of the person who most closely conforms to their imperfect mental image of the offender.[121] This tendency of witnesses is likely to be particularly strong because they will assume that the police have a suspect, and that the police are merely seeking confirmation of their suspicions.

There is considerable experimental evidence that subjects with a high expectation that the person they saw is in a lineup are more likely to make errors (pick a wrong person) than those who have a low expectation. In one study[122] witnesses to a staged assault were given either a high expectancy instruction: "Find the assailant among these six photographs"; or a low expectancy instruction: "Do you recognize anyone among these six photographs?" Although witnesses given the high expectancy instruction were significantly more likely to select the assailant's photograph when it appeared, they were more inclined to identify an innocent person when it did not appear.

A research paper undertaken for the Law Reform Commission[123] also tested the effect of high as opposed to low expectancy instructions. One group of subjects was told: "In the lineup you are about to see, the criminal may or may not be present; he is not necessarily there. If he is there, he may or may not be wearing the same clothing." Another group of subjects was told: "You have been the eyewitness to a crime. I'd like you to imagine that the police have asked you to come to the police station to view a lineup to see whether or not you can identify the criminal." Consistent with previous findings, the subjects who were given the low expectancy instruction made significantly fewer identification errors.[124]

It is probably inevitable that witnesses who are asked by the police to view a lineup will believe that the police have a suspect.[125] However, it is quite another thing for the police to say anything to make the witness believe that they are convinced of the guilt of a particular person. Witnesses who view a lineup thinking that the police have made a positive identification may feel little reluctance in guessing at the identity of the suspect. Their attitude will be that if they guess correctly, the prosecution's case against a guilty person will be strengthened; if they guess incorrectly, no harm will be done, since the police will realize they have identified the wrong person.

The police should not, therefore, express any opinion to the witness as to whether they think they have apprehended the offender. Nor should witnesses be told to pick the "right person" from the lineup or be given similar instructions, since such an instruction implies that the police believe the criminal to be among the lineup participants.

While the recommended instructions will obviously not remove all suspicion from the witness's mind that the police know who the offender is, they should go some distance in removing the pressure on the witness simply to select the most likely-looking person. The instructions should assure witnesses that they will not have "failed" if they do not choose someone.

Case Law

The Supreme Court of New South Wales[126] has stated that there is nothing wrong with the police indicating to a witness that they have a suspect. In that case a witness testified that before viewing the lineup he was told "to examine them carefully and when I got the right man to put my right hand on his shoulder". The witness also said that the police "told me there were some men lined up and I had to pick out the one I thought was the right one". The court reasoned:

> [A]ny sensible person who attends an identification parade at a police station does so with the reasonable foresight that he is being asked to identify there a man suspected of the crime, and it is unreal to suggest that the evidence is unreliable merely because he believes in advance that one of the men in the line might be his assailant.[127]

The British Columbia Court of Appeal, on the other hand, was critical of the policy of telling witnesses before they viewed the lineup that "they [the police] had picked up one of the men, the man who had the gun, and that he was to appear in a line-up".[128]

In a South African case[129] the court suggested that the police give an instruction similar to the one recommended in the guidelines: "[I]t is

important that officers holding identification parades should add the important words 'if such person is present on the parade', otherwise a witness ... might think it is his duty to point out somebody....''[130]

Present Practice

No police force routinely instructs witnesses that the person they saw might not be present. On the other hand, most report they do not expressly tell the witness that they have a suspect; they simply ask the witness if the assailant, for example, is in the group.

(d) ***To Identify the Person They Saw.*** **To indicate whether they can positively identify anyone as the person they saw.**

COMMENT

This guideline attempts to ensure a positive identification. An empirical study found that subjects given a lax instruction (''Don't worry too much about making mistakes'') made twice as many errors as those given a strict instruction (''The faces that you saw may not be here. You should pick out someone only if you are quite sure he is the person that you saw'').[131]

The Devlin Committee considered a proposal to pose three questions to the witness: ''(1) Can you positively identify anyone in the parade as the person you saw? (2) If not, does anyone on the parade closely resemble the person you saw? (3) If not, can you say that the person you saw is not on the parade?''[132]

It was suggested that by asking separate questions about identity and resemblance, the witnesses would convey the degree of their certainty. It was also thought that a series of questions would serve to alleviate the pressure on the witness to make a positive identification. The second question would give the witness an opportunity to escape the pressure to identify without feeling totally unhelpful.

The Devlin Committee eventually decided not to make such a recommendation because it feared there might be some danger in asking the witness a question about resemblance. The Committee reasoned that the suspect will usually bear some resemblance to the witness's description of the offender; otherwise, he or she would probably not be asked to appear in the lineup. Moreover, since all of the participants should resemble the suspect in a general way, it would be incongruous for the witness to assert that the suspect resembles the offender but that the others do not. Further, since the witness has described the offender's

appearance to the police, a statement that none of the lineup participants resemble the accused carries with it either an admission that the witness did not adequately describe the offender, or a suggestion that the police were not doing a good job in locating suspects who fit the description. Finally, the chief reason that the Devlin Committee did not make this recommendation was the perceived danger that witnesses would become confused by the multiple questions.[133]

For the reasons given by Devlin, the best approach would appear to be simply to ask witnesses whether they can positively identify the offender. Witnesses will often identify on the basis of resemblance without being told to do so. Supplementary questions relating to the certainty and basis of an identification can be asked after the witness has indicated a selection. The supplementary questions should disclose witnesses who have identified on the basis of resemblance. To instruct witnesses to point to a person who closely resembles the offender would likely only encourage this tendency.

Rules 205 (a) to (d) might be implemented by an instruction such as the following:

> We do not strongly suspect any of the persons standing here before you (among these photographs). If you think that you can identify a person as the person you saw, before you do so, be sure that you carefully study each of the lineup members (photographs). Each will in some way resemble the description we have of the offender. Can you positively say that one of these persons is the one you saw? It is not necessary to choose anyone; remember that the offender may not be present and that it is easy to mistake one person for another.

Present Practice

Most police forces do not appear to indicate to the witnesses how certain they must be before they select someone as the person they saw. However, in some cities the police do ask the witnesses to identify someone only if they are positive. For example, in Calgary, witnesses are told that if they are not positive they should not make an identification. In Regina, witnesses are advised that if they are not sure or are unable to make any identification, they are to say so. In Edmonton, witnesses are advised not to identify someone unless they are positive. In Vancouver, they are advised that if they do not recognize the suspect or are not sure, they should not identify anyone.

(e) *To Indicate the Degree of Confidence in the Identification.* **To indicate how certain they are that the person they identified is the person they saw.**

COMMENT

It is important that, at the time of the initial identification, witnesses be asked how confident they are about the accuracy of their identification. As mentioned above, there is a tendency for witnesses to identify someone merely because that person bears the closest resemblance of all of the lineup participants to the witnesses' mental picture of the offender. This problem is exacerbated by the tendency of witnesses to become progressively more certain of their identifications with the passage of time.[134] Thus witnesses may point to a suspect at the lineup because the suspect "looks like" the offender. There may be substantial doubt in the witnesses' mind about whether the resemblance is close enough to be safely referred to as identity. Yet having committed themselves to a position at the lineup, witnesses will be reluctant to admit later that they may have been mistaken. Furthermore, over time the witness's image of the offender may undergo subtle changes, so that it more closely corresponds to the accused's appearance. By this process, witnesses unconsciously reinforce their choice. The result often is that a witness whose initial identification of the accused was far from certain, will testify at trial in the most sincere and positive manner that the accused is the criminal.

This guideline assumes that it may be possible to counteract this tendency towards progressive assurance by requiring witnesses to acknowledge at the time of their lineup identification, whether they are at all uncertain and whether their identification is based upon mere resemblance. Witnesses who have admitted to some doubt at the lineup identification, will not be subject to such strong pressure to reinforce and defend their previous decision. Also the testimony of a witness who has made a qualified identification at the lineup but who then testifies with complete assurance at trial, will be subject to evaluation in view of this apparent inconsistency.

There has been a substantial amount of psychological research on the question of whether the confidence with which people make an identification is related to the accuracy of their choice.[135] A number of studies have found no correlation. This suggests that perhaps a high degree of confidence on the witness's part might simply indicate the witness's desire to appear to be a good witness, that the witness is a person who is quick to stereotype, or simply the witness's general temperament. Other studies have found a negative correlation — the more certain a witness is, the less likely it is that he or she is accurate.[136]

Intuitively, it seems clear that in some cases, a witness who makes an identification only after long and careful study of the entire lineup, and who frankly acknowledges the possibility of mistake, might be more trustworthy than the witness who confidently identifies the accused

without a moment's hesitation. A review and rationalization of the studies concluded that there is likely to be a correlation between a witness's confidence in his or her identification and its accuracy, if the original perception was made under optimal conditions.[137] Therefore, since at least in some cases such a correlation probably exists, evidence of the witness's confidence should be before the court.

However, even if there were little correlation in some circumstances between a witness's confidence and accuracy, there would still appear to be value in obtaining a statement of the witness's confidence at the time of the identification. As mentioned above, this practice would permit the court to weigh such statements along with any statements the witness may make at trial. Any discrepancy in confidence would call for some explanation.

Some consideration was given to the possibility of posing a series of questions to witnesses, asking them which question best describes their judgment. The following questions, for instance, might be asked at the time the identification is made: (a) Are you certain that the person you have chosen is the person you saw? (b) If not, would you say your choice is the one who most closely resembles the one you saw?

However, the degree of a witness's confidence is most likely to be discernible if stated in his or her own words. Moreover, this will lessen any confusion as to the degree of the witness's confidence over time.

Case Law

The possible danger that witnesses' degree of confidence in their identification is likely to increase over time has been recognized by the courts. Thus Laskin J.A. (as he then was) in a judgment of the Ontario Court of Appeal, stated: "[S]tudies have shown the progressive assurance that builds upon an original identification that may be erroneous."[138] Other courts have acknowledged that a witness's certainty may be misleading if she or he initially makes a tentative identification, but later expresses a firm conviction in his or her selection.[139]

In evaluating testimony, the courts frequently note witnesses' confidence in their identification at trial. However, they have not formulated a strict guideline as to what weight should be given to a witness's degree of confidence. In some cases, if a witness at trial clearly lacks confidence in the identification of the accused and expresses uncertainty, Courts of Appeal have quashed convictions if this is the only identification evidence available.[140] However, other courts have recognized that there is no necessary relationship between a witness's certainty

of identification and the reliability of his or her identification.[141] Moreover, in some cases, Courts of Appeal have been willing to sustain a conviction based upon a weak expression of identification.[142]

Present Practice

Most police departments in Ontario cities report that they do not ask witnesses how certain they are when they make an identification; they simply record everything that is said. Most police departments in other cities, however, report that they do question witnesses about how certain they are after they have identified a suspect. Some police departments do not do it routinely. For example, Vancouver and Calgary suggest that it may be discussed and that the investigating officer may ask the question, but the question is not asked in every case as a matter of course.

(f) ***To Indicate the Basis of Identification.*** **To indicate the features or describe the overall impression of the person upon which their identification is based.**

COMMENT

Many people have difficulty articulating the basis for their recognition of a person, and there may be no correlation between a person's ability to describe why they identified a particular person and the accuracy of that identification.[143] However, it is still useful to have witnesses articulate, in as much detail as possible, the basis of their identification. First, it may expose untrustworthy witnesses. For example, given the distance at which, or the lighting conditions under which their original observation took place, it might have been impossible for them to discern the particular features upon which they purport to base their identification. Second, if the basis of the witness's identification is a feature possessed by the suspect but not the other lineup members, the fairness of the lineup might be impeached. For example, if a witness asserts that he or she identified the suspect because she was pigeon-toed, and she was the only person in the lineup with this characteristic, then the lineup could be discredited. (Presumably this would only occur in a situation in which the eyewitness had not mentioned this characteristic to the police before the lineup, since otherwise the police would have ensured that all lineup participants have this characteristic.)

One danger in asking witnesses questions about the basis of their identification is that those who have difficulty expressing themselves, or who did not perceive the appearance of the person identified in terms of specific features, may lose confidence in their ability to identify. In some cases this may be desirable; but in others, a perfectly reliable witness

may be made to appear confused and indecisive. Therefore, the instruction to the witnesses should not compel them to describe identifying features of the suspect, but should invite them simply to give their overall impression of the person upon which their identification is based.

Case Law

It would appear that some courts place considerable weight on witnesses' ability to articulate the basis of their identification. Indeed, many cases require that evidence of identification be definite if it is to be of any value. For example in *R.* v. *Smith*,[144] the judge noted:

> If the identification of an accused depends upon unreliable and shadowy mental operations, without reference to any characteristic which can be described by the witness, and he is totally unable to testify what impression moved his senses or stirred and clarified his memory, such identification, unsupported and alone, amounts to little more than speculative opinion or unsubstantial conjecture, and at its strongest is a most insecure basis upon which to found that abiding and moral assurance of guilt necessary to eliminate reasonable doubt.[145]

Present Practice

Most cities report that after an identification is made, the witness will be asked for the basis of that identification. Victoria and Edmonton, however, report that this question is not asked. Vancouver notes that the investigating officer may ask this question; however, it is not asked by the identification squad.

Rule 206. Maintaining a Record

(1) ***Procedures Applicable to All Eyewitness Identification Procedures.*** **A complete record of each identification procedure, written on a prescribed form, shall be maintained. The record shall contain the following information:**

COMMENT

This rule simply restates a basic tenet of sound police practice: A thorough record should be kept of every important phase of criminal investigations. The safeguards provided for in these guidelines will not be effective unless a complete and accurate record is kept of every aspect of every pretrial identification procedure. This record is necesary to enable counsel and the court to review the fairness of the proceedings, and to assess its influence upon the witnesses' identification testimony.

An incidental advantage of requiring supervising officers to maintain detailed records is that it will encourage them to become familiar with the provisions of these guidelines. It will also help to impress upon them the importance of pretrial identifications to the determination of a suspect's guilt or innocence. Finally, it will make clear to supervising officers that the ultimate responsibility for the fairness of the proceeding rests upon them. Keeping a complete record of the proceedings should not impose an administrative burden on supervising officers, since the proper conducting of the procedure will require them to make inquiries as to the various matters that must be recorded in any event. It should not involve much additional effort to record the responses; in some cases the officers would be assisted by a stenographer.

The form upon which the information is recorded should be prescribed. This will ensure that there is uniformity in practice and that all the relevant information is recorded. Prescribed forms will also facilitate the recording of the information, and will make it easier for users to determine the relevant information. No sample forms are suggested in this paper. However, an idea of how such forms might be laid out can be obtained by reviewing the forms prescribed for the police in England.[146] Many police forces now use standardized identification forms; however, they do not require as complete a record as would be required by these guidelines.

In commenting upon the various matters that this Rule requires to be included in the record, the author will refer to relevant rules in these guidelines. The significance of the matter will be discussed in the commentary following that rule.

Present Practice With Respect to Records Generally

Virtually all cities report that a record is kept of the lineup proceedings. Most cities have a standard lineup form that is filled out by the officer in charge. In Toronto, a stenographer is usually present at the lineup and records everything said. This is not the case in other cities.

(a) ***The Offence.*** **The alleged offence to which the pretrial eyewitness identification procedure relates.**

(b) ***Witnesses.*** **The names and addresses of all witnesses who took part in a pretrial identification procedure, whether or not they made an identification.**

COMMENT

At trial the prosecution is likely to call as witnesses only those persons who identified the accused at a pretrial identification procedure. However, it might be particularly important for the court, in assessing the reliability of an identification made by a witness, to know whether any other witnesses were unable to identify the accused.[147] Therefore, a record should be kept of all witnesses who attempted an identification.

Case Law

In *R.* v. *Churchman and Durham*[148] it was held that at the preliminary hearing the defence was entitled to cross-examine in order to secure the names of everyone viewing a lineup, including those who did not identify anyone or who identified the wrong person.

(c) ***Persons Present.*** **The names of the supervising and accompanying officers, and other police officers and persons present.**

(d) ***Procedure.*** **The type, date, time and location of the procedure.**

(e) ***Statements Made.*** **Any statements made by, or to, the witness in the course of the procedure.**

(f) ***Confidence.*** **If the procedure involves obtaining a description from the witness, a statement as to how confident the witness is that he or she can identify the suspect. If the procedure involves identifying a person, and if the witness identifies a person, a statement as to how confident the witness is that he or she has correctly identified the person he or she saw.**

COMMENT

See Rules 205(f) and 303(d).

(g) ***Basis.*** **If the witness identifies a person, the features of the person's appearance upon which the identification was made.**

COMMENT

See Rule 205 (f).

(h) ***Objections.*** **Any objections, suggestions or observations made by the suspect or his or her counsel, as well as any action taken in response to such objection or suggestion.**

COMMENT

See Rule 505(10).

(i) *Other Relevant Factors*:

(i) whether the witness identified any person other than the suspect;

(ii) whether the witness previously discussed the suspect's appearance with any other witnesses;

(iii) whether the witness had previously seen the suspect or a photograph of him or her; and

(iv) any other factor relating to the procedure that might be relevant in assessing the reliability of the witness's identification.

COMMENT

Obviously the court should have before it all evidence necessary to assess the witness's reliability. Therefore, a record should be kept of all such facts.

Case Law

An identifying witness's reliability may sometimes be attacked by proving that, on previous occasions, he or she made observational errors. The most common example of these types of mistakes occurs where the witness fails to identify the accused at an identification test, or mistakenly identifies an innocent participant. Courts invariably comment on this type of error in assessing the trustworthiness of a witness's testimony.[149]

(2) ***Procedures Applicable Only to Specific Eyewitness Identification Procedures.***

(a) *Description*. **If the procedure involved obtaining a verbal description, all questions asked of the witness and all responses to them.**

COMMENT

See Part III of these Rules.

Present Practice

Police in all cities report that a written record is kept of the description given by all witnesses. If a potential witness cannot describe

or identify the suspect, this is mentioned in the initial report by the investigator. In some cities a standard form is used for taking statements and descriptions of the suspect by the witness, and police in a few cities report that this statement is signed by the witness.

(b) *Lineup.* If the procedure is a lineup:

(i) the names and addresses of all lineup participants;

COMMENT

Particularly where the accused was not represented at the lineup, his or her lawyer may wish to question the lineup participants about what transpired at the proceeding. In the event that no photograph was taken of the lineup, it might also be important that these people be contacted so that a comparison can be made between their appearances and the accused's. Even where a photograph is available, the defence counsel may believe that the differences in appearance between the accused and the others will be more effectively brought to the jury's attention if the lineup participants attend the trial in person. The accused's lawyer might also wish to know the names of the lineup participants in order to determine such matters as whether any lineup participant was acquainted with the witness, or if they had stood in any other lineups viewed by the same witness.

Present Practice

In virtually all cities a report is kept of the name, address, description, and position in the lineup of each person in the lineup. This is frequently recorded on a special form.

(ii) a colour photograph of the lineup;

COMMENT

See Rule 505(11).

(iii) a description of any special lineup procedures followed.

COMMENT

This description should include any particular actions that were taken, in accordance with the Rules in 505, relating to the conducting of

the lineup, such as any words spoken, clothing donned, bodily movement or gestures performed by any or all of the lineup members, any steps taken to conceal any distinguishing marks or features possessed by the suspect, and any attempts made to simulate conditions which existed during the witness's observation at the scene of the crime.

(c) *Photographic Display*. If the procedure is a photographic display:

(i) if, when the photographs were shown, there was no suspect, a record that will permit the photographs shown to the witness to be retrieved and placed in the sequence in which they were shown; and

COMMENT

Frequently, if the police have no suspect, they will show a witness a series of "mugshots" of persons fitting the general description of the person the witness saw, who might possibly be that person. Guidelines relating to this procedure are provided for in Part VI.

Although as many as fifty or even hundreds of such photographs might be shown to a witness, it is important that a record be kept of all photographs shown. The reason for this relates to a psychological phenomenon often referred to as unconscious transference.[150] In the context of a lineup, this means that an eyewitness might pick a person because his or her face is similar to one that the eyewitness saw in a "mugshot" display, instead of at the scene of the crime. Although the eyewitness will recognize the familar face, he or she will unconsciously transfer the place at which it was seen.

Studies conducted by Brown and colleagues[151] confirm the dangers that arise when a witness who is to view a lineup sees a photograph of a person who subsequently appears in the lineup. In one of their studies, for example, subjects were shown a group of criminals. An hour and a half later, they were shown a number of "mugshots". One week later, they were asked to pick the "criminals" out of a lineup. The witnesses mistakenly identified as criminals 8 per cent of the participants in the lineup whom they had never seen before. However, if an innocent participant's photograph had appeared in the earlier mugshot display, his chances of being falsely identified rose to 20 per cent. Thus, the study shows rather dramatically the dangers of a photo-biased lineup.

Of course, another reason for keeping a record of the photographs is that, if a person's mugshot appeared in the display and he or she was not identified, but was later picked out of a lineup by a witness, that fact alone would be relevant in assessing the reliability of the identification: A

question would arise as to why the witness was unable to pick the person out of the mugshot display.

(ii) if, when the photographs were shown, there was a suspect, the photographs shown to the witness as they were affixed to a display board, or the photographs that were handed to the witness for his or her inspection.

COMMENT

If the pretrial identification procedure is composed of a photograph display, the part of the record that will be most valuable to the court is the photographs actually shown to the witness. This will permit the court to decide whether the accused's photograph stood out in any material respect from the others.

Case Law

At present, the photographic array shown to an identifying witness is not always available for the court's inspection. In some cases the courts have expressed concern about the absence of this record,[152] but in other cases they appear not to have appreciated its significance.[153] The importance of introducing the photographic display at trial was illustrated in *R.* v. *Pace*.[154] Although the conviction was upheld in that case on the basis of one other witness's identification evidence, the photographic display introduced into evidence served to discount completely the evidence of a number of witnesses. "The various witnesses were shown a group of sixteen loose photographs of which six were of the appellant taken at different times.... [O]f the ten photographs of men other than the appellant, only one or two resemble the accused and then only remotely.... In addition, and more importantly, it was the coloured photograph C-2A that several witnesses picked out as resembling the robber. None of the other fifteen pictures were in colour...".[155]

Present Practice

Police in virtually all cities report that if photographs are used, a record is kept of these photographs and they are subsequently available for production in court if called for.

(d) ***Informal Viewing.*** **If the procedure involves an informal viewing:**

(i) a general description of how the informal viewing was conducted;

(ii) the approximate number of people viewed who were similar in description to the suspect;

(iii) the suspect's reaction if he became aware that he was being observed;

(iv) the witness's reaction upon seeing the suspect; and

(v) the reason for holding an informal viewing in lieu of a lineup or a photographic display.

COMMENT

See Part VII of these Rules.

(e) *Confrontation*. If the procedure involves a confrontation:

(i) the exact circumstances surrounding the confrontation;

(ii) the witness's reaction upon seeing the suspect;

(iii) the suspect's reaction if he or she is identified; and

(iv) the reasons for holding a confrontation in lieu of a lineup, photographic display, or informal viewing.

COMMENT

See Part VIII of these Rules.

Case Law

The suspect's reaction upon being identified by a witness will often be relevant as an indication that he or she is or is not the criminal. There is some disagreement in the cases as to when the accused's conduct in the face of an accusation might amount to an implied admission.[156] However, in some circumstances even the accused's silence has been found to be relevant evidence of guilt, if in the circumstances surrounding the statement it would have been normal for the accused to deny the validity of the identification.[157] Also, of course, the accused's denial of an accusation is relevant evidence and thus should be recorded.[158]

Rule 207. Access to Records

Copies of the records of all pretrial eyewitness identification procedures relating to the case and involving the accused shall be available to the accused or to his or her counsel prior to trial, whether or not the prosecution intends to offer evidence of any eyewitness identification procedure. Copies of the description of the suspect given by each witness

shall be given to the accused or to his or her counsel before a lineup, photographic display or informal viewing is held. All other records shall be given to the accused or to his or her counsel as soon as is reasonably possible but not less than five days after the procedure has been held.

COMMENT

One important purpose of keeping a detailed record of all pretrial identification procedures will not be fulfilled if the accused is not given access to the record.

In order to cross-examine effectively identifying witnesses called by the prosecutor, the defence counsel should be given the same description of the suspect as was initially given by a witness to the police. As will be discussed under the rules dealing with descriptions, some people are notoriously bad at describing others, but better at recognizing them. However, this is a matter to be taken into account by the trier of fact. Even if the initial description given by a witness is not detailed, it is still, in many cases, essential in assessing the witness's credibility. Furthermore, defence counsel should not have to wait until cross-examination to obtain the description given by the witness. This information should be available to counsel prior to trial, so that he or she can effectively prepare for it.

Indeed, the guideline recommends that descriptions be given to defence counsel prior to an identification test. A subsequent rule in these guidelines recommends that the accused be entitled to have counsel present at a lineup so that he or she can make suggestions as to its fairness and can observe its conduct. Only if counsel has the descriptions of the suspect given by the eyewitnesses will he or she be able to evaluate the fairness of the lineup and thus make suggestions or objections to the identification officer.

The guidelines require that records be kept not only of the descriptions given by witnesses who identified the suspect at a lineup, but of all eyewitnesses to a crime. Some of these witnesses may attend an identification test and identify a person other than the suspect; some may fail to make an identification; some may attend identification tests not containing the accused; and others, for whatever reason, may not be required by the police to attend an identification test. However, the defence should have access to all of these records. In determining the credibility of those witnesses who identified the suspect, the descriptions given by those who did not or were not asked to do so might be relevant.

The defence should also obtain the records of all identification tests relating to the offence for which the accused is charged, and not only the

record of the test in which the accused was identified. The records of all tests relating to the offence for which the accused is charged are essential in assessing the reliability of the identification evidence.

This rule raises several issues relating to discovery in criminal cases. As with many forms of criminal discovery, there will be a concern that if the defence is given access to these records prior to trial, it might use them to intimidate and confuse Crown witnesses. This problem will have to be resolved by the Law Reform Commission in a manner consistent with its other recommendations in the area of discovery in criminal cases.

Present Practice

Police forces in most cities report that the records are not given directly to the defence counsel; they are provided to the prosecutor, who may or may not give them to defense counsel. However, the police in Calgary and Vancouver report that the record of the lineup is routinely given to the defence counsel before trial. The Vancouver and Regina police report that descriptions are routinely given to the defence counsel.

Case Law

There are no cases requiring the defence to be given access to all the records of pretrial identification procedures. However, in *R.* v. *Churchman and Durham*[159] it was held that the defence was entitled to cross-examine at the preliminary hearing in order to secure the names of everyone viewing a lineup, including those who did not identify anyone or who identified the wrong person.

Rule 208. Right to Counsel

(1) ***In General.*** **If a person is suspected of a crime and the police have reasonable cause to arrest him or her, and his or her whereabouts are known, he or she has a right to have a lawyer present at any pretrial eyewitness identification procedure except the procedure of obtaining descriptions from witnesses, unless:**

(a) ***Counsel Fails to Appear.*** **Having received a certain minimum notice (for example, twenty-four hours) prior to the time such procedure is to take place, the suspect does not notify a lawyer, or his or her lawyer fails to be present.**

(b) ***Counsel Is Excluded.*** **The lawyer is excluded from the identification procedure by the identification officer because he or she was obstructing the identification.**

(c) ***Exceptional Circumstances Arise.*** **Awaiting the presence of counsel would likely prevent the making of an identification.**

COMMENT

The presence of counsel at identification procedures is critical for at least two reasons. First, counsel might be able to remove any possible danger of suggestion, intentional or otherwise, in the conducting of the identification procedure. As explained above, this is important since any harm caused by suggestion could be irreparable: Once a witness has picked a suspect out of a lineup, a change of mind is unlikely.

Second, the presence of counsel is important so that the pretrial identification procedure can be reconstructed at trial. The accused's lack of training and emotional tension at the pretrial identification would usually preclude him or her from critically observing the whole procedure so as to be capable of later attacking in court the manner in which the procedure was conducted. Furthermore, the accused would have no way of knowing exactly how the procedure was conducted since witnesses usually observe lineups from behind one-way mirrors. Even if an accused did attempt to reconstruct the identification procedure in court, the allegation would probably not be accorded much weight against any contradicting police testimony. In the absence of counsel, even a written record of the entire procedure might be of little assistance to the defence in determining whether the procedure was fairly conducted. A lawyer who had been present at the identification procedure would be well prepared to set out any unfair circumstances surrounding the identification.

The presence of counsel at lineups will also provide the police with some protection from subsequent allegations that the lineup was unfairly conducted. Furthermore, in situations where the guidelines do not provide explicit instructions, the police may appreciate the suggestions of the suspect's counsel. In these ways, effective law enforcement can only be enhanced.

Finally, since the suspect is unlikely to be familiar with the pretrial identification procedure, a lawyer can be a source of assurance.[160]

Lawyers may not often wish to appear at the lineup. They may be concerned that they will then be called as witnesses at trial. In other circumstances, lawyers may be confident that they can advise their clients of their rights without being present and can assume that the police will conduct a fair lineup. However, the question of whether the suspect will exercise the right to have a lawyer present is quite irrelevant to the question of whether the right should be available.

A survey of the parameters of the right to counsel in European countries offers evidence of the almost universal respect for it at pretrial eyewitness identification procedures. The new identification-parade rules

released by the Home Office in England explicitly provide that a suspect has the right to have a solicitor or friend present at the parade.[161] The French *Code of Criminal Procedure* provides that an accused may be confronted by witnesses only in the presence of his counsel, unless the accused waives this right.[162] Supplemental legislation has since given an accused the right to counsel "en tout état de cause".[163] The German *Code of Criminal Procedure* is not explicit as to the extent of an accused's right to counsel at a confrontation with witnesses. However, in article 137.I, it is stated that an accused "may avail himself of the assistance of defense counsel at any stage of the proceeding".[164] In Italy, the *Constitution* itself guarantees the right to defence at all stages of the procedure. The absolute nature of this right ensures that it does not depend on judicial authorization. In addition, the *Code of Penal Procedure* declares the right of defence counsel to be present during any judicial experiment, expert examination, search of domicile, or formal identification of the accused by witnesses.[165]

The United States jurisprudence on the right to counsel at lineups is discussed under *Case Law*, below.

Although extending the right to counsel to lineups might not be contentious, this would probably not hold true with respect to photographic displays. But the need for counsel at a photographic display is certainly as great as the need for counsel at a lineup: the potential for harmful suggestion is greater at a photographic display than at a lineup (and the possibilities for suggestion more subtle); there are fewer neutral observers at the photographic display (for example, there are no distractors); the suspect will not be present at the identification procedure; a photographic identification is as difficult to reconstruct at trial as a lineup; and witnesses are as unlikely to retract photographic identifications as they are lineup identifications. Thus, since there is no countervailing law enforcement interest in proceeding with a photographic display in the absence of a suspect's lawyer (invariably witnesses will have to be contacted and times set, thus providing time to notify counsel), the suspect should have the right to counsel extended to photographic displays.

The right to counsel at photographic displays could, in some cases, cause considerable inconvenience and expense. For example, when the accused's place of custody is far removed from potential witnesses, it might be burdensome to bring the witnesses to the accused or to require defence counsel to travel with the police from one location to another. However, these cases can be minimized, and a substitute counsel might be used in some cases. Finally, it may be possible in some cases for the police to prove the necessity of conducting the photographic display in counsel's absence because of exceptional circumstances, and thus bring

the proceeding within the exception provided in Rule 208(1)(c) or within the general exception to the application of these rules, Rule 108.

Under the guideline, the point at which a suspect's right to counsel is "triggered" is when (i) a person is suspected of a crime, (ii) the police have reasonable cause to arrest the suspect, and (iii) the suspect's whereabouts are known. Each of these elements will be examined separately.

(i) *A person is suspected of a crime.* Obviously, when the police have no suspect and are using photographs to provide investigative leads, a "counsel requirement" would be practically impossible, since counsel would have to be afforded for each person whose picture is displayed. Thus, the rule provides a right to counsel only to a person suspected of a crime.

(ii) *The police have reasonable cause to arrest the suspect.* Before a right to counsel is "triggered", the police must have reasonable cause to arrest the suspect. Thus, for example, if the police have some circumstantial evidence which points to a particular suspect, but they need a photographic identification in order to establish reasonable cause to arrest, the suspect will not have a right to counsel. Although the danger of suggestion is present at such a photographic display, the law enforcement interests in withholding the right to counsel are compelling. First, notifying counsel might cause some delay in a situation in which a speedy arrest is necessary. Second, if the police have more than one suspect, several lawyers might be necessary, occasioning considerable inconvenience. Third, there would be enormous practical problems in attempting to provide counsel for suspects not yet arrested.

It might be argued that requiring a person to have a right to counsel at all pretrial identification procedures, as soon as the police have reasonable cause to arrest the suspect, is granting the right at too early a stage in the proceedings. The right to counsel should only be "triggered" when a person is taken into custody or is arrested, or only after the formal decision to charge is made — that is, after a complaint, indictment or information is filed. This standard would be much easier to apply than the one proposed. In addition, in some cases the police may rush to identify a suspect but not arrest him — for example, in a conspiracy charge involving many suspects. However, the difficulty with using arrest as the trigger for the right to counsel is that the reasons for providing a person with a right to counsel at a pretrial identification procedure (for example, to ensure that the procedure is unsuggestive and can be reconstructed at trial) apply with equal force whether the person is only a suspect or is charged. Furthermore, if the right to counsel were not provided until a charge was laid, an incentive would be provided to law

enforcement officials to delay the issuing of a complaint, information or indictment.

(iii) *The suspect's whereabouts are known.* The police might have a suspect but might be unable to locate him or her. In some such situations it might be advisable to hold a photographic display while the memory of the suspect's appearance is fresh in the minds of the eyewitnesses. Obviously, in such a case, it will be impossible to provide the suspect with a lawyer (unless one is appointed by the court).

The right to counsel is not provided by the guideline for the pretrial interview of prospective witnesses. Requiring a lawyer's presence at these procedures would impair effective law enforcement. Furthermore, whereas testimony regarding a pretrial identification is admissible as an exception to the hearsay rule, testimony concerning interviews relating to an identification is excluded as hearsay. Thus, the witness must take the stand, give testimony, and be cross-examined if such testimony is to be admitted. Finally, mistakes in a description of the offender are much less serious, and the evidence itself less probative and decisive, than mistakes in direct identification testimony.

There are three exceptional circumstances in which the suspect will not have a right to counsel. The first exception is where the accused refuses to notify a lawyer or the lawyer does not appear within a reasonable time. Obviously there are strong law enforcement interests in holding a lineup as soon as possible after the police have a suspect: the police may want to determine whether they have the right person before they lay a formal charge, in order to complete their investigation; witnesses may be anxious to make an identification as soon as possible; and finally, if the suspect is not identified, the police will want to begin investigating alternative leads. This need to hold lineups or other identification procedures expeditiously must, of course, be balanced against the suspect's interests in having his or her rights protected by the presence of counsel at the procedure. But, particularly if the suspect is not in custody, he or she may be in no special haste to have the lineup held. Although the police should provide a reasonable time to allow the suspect to obtain a lawyer, they should not hold up the procedure indefinitely. Therefore, the rule provides that the suspect has twenty-four hours to obtain a lawyer. This is an arbitrary time limit, but a clear line is necessary here so that the police may know exactly when they may proceed with an identification procedure in the absence of counsel. Of course, if the suspect's lawyer is not present within twenty-four hours, the suspect could continue to delay a lineup by simply refusing to participate. However, evidence of a refusal to participate in a lineup may be considered relevant and therefore admissible at trial.[166] Moreover, it has been held that an accused does not have the right to delay the police

in the discharge of their duties, which include requests that the accused participate in identification procedures.

The second exception provides that the right to counsel may be suspended if the lawyer is obstructing the identification procedure. The reasons for this exception are obvious. Since the supervising officer has control over the identification procedure by virtue of Rule 103, it is he or she who has the right to exclude the accused's lawyer if the lawyer is obstructing the proceedings.

The final situation in which there will not be a right to counsel is where the circumstances are exceptional — for example, where a witness is in danger of dying at the scene of the crime. Awaiting the presence of a lawyer in such a circumstance would likely preclude the making of any identification.

Case Law

There does not appear to be a single Commonwealth case in which the right of a suspect to be represented by counsel at a lineup or other pretrial identification procedure has even been raised.[167] However, the subject has frequently been argued in American courts, and is the subject of innumerable law journal articles.[168] Since evidence obtained pursuant to a denial of a right to counsel is excluded in the United States, the jurisprudence generally arises in the context of the exclusion of illegally obtained evidence.

The American position is based on the trilogy of cases decided by the United States Supreme Court (the Warren Court) on June 12, 1967 and three cases decided in 1972-73 (by the Burger Court). A review of these cases and the reasoning adopted in them will illustrate the possible scope of a right-to-counsel provision such as provided in Canada's new Charter of Rights.

In the leading case, *U.S.* v. *Wade*,[169] it was held that there was a right to counsel at a post-indictment lineup, predicated on the American Sixth Amendment right to counsel. It was held that this constitutional right pertained not only to trial, but also to any critical stage of the prosecution "where counsel's absence might derogate from the accused's right to a fair trial ... as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself."[170]

In holding that the right to counsel at a lineup might derogate from the accused's right to a fair trial, the court reasoned:

> Insofar as the accused's conviction may rest on a courtroom identification, in fact, the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him....
>
> Since it appears that there is grave potential for prejudice, intentional or not, in the pretial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that, for Wade, the post-indictment lineup was a crictical stage of the prosecution at which he was "as much entitled to such aid [of counsel] ... as at the trial itself."[171]

In *Wade*, the prosecution had an eyewitness make an in-court identification. But the eyewitness had previously identified the accused at a lineup at which the accused was not allowed to be represented by counsel. As a sanction for the failure to afford Wade the right to counsel at the lineup, the court held that the in-court identification must be excluded, unless the prosecution could establish by clear and convincing evidence that the in-court identification was not tainted by the illegal lineup, but was of independent origin. This independent source test included consideration of

> the prior opportunity [of the witness] to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occassion, and the lapse of time between the alleged act and the lineup identification.[172]

In *Gilbert* v. *California*,[173] the second case in the Warren Court trilogy, *Wade* was followed and extended by the further holding that out-of-court identifications made at a lineup where defence counsel was neither present nor notified are *per se* inadmissible. That is to say, if the prosecution introduces, as part of its direct case, evidence of a tainted pretrial confrontation, the conviction must be reversed. It will not suffice to establish an independent source. There must be a new trial. The reason for this broader rule was stated to be as follows:

> Only a *per se* exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup. In the absence of legislative regulations adequate to avoid the hazards to a fair trial which inhere in lineups as presently conducted, the desirability of deterring the constitutionally objectionable practice must prevail over the undesirability of excluding relevant evidence.[174]

Taken together then, the combined effect of *Wade* and *Gilbert* was that testimony about any pretrial confrontation without counsel was to be completely excluded.

In the final case of the Warren Court trilogy, *Stovall* v. *Denno*,[175] it was held that the newly-enunciated principles of *Wade* and *Gilbert* would

not be applied retroactively. *Stovall* also decided that, aside from the accused's right to counsel, if a pretrial identification was unnecessarily suggestive, it would violate the accused's right to due process of law and would therefore be excluded from evidence at trial.

The *Wade-Gilbert-Stovall* decisions provided broad constitutional safeguards for suspects subjected to pretrial identification procedures. However, beginning with three decisions of the United States Supreme Court in 1972-73 under Chief Justice Burger, the American courts have substantially retreated from this position.

In *Kirby* v. *Illinois*,[176] the *Wade-Gilbert* ruling as to the right to counsel was limited to those in-person confrontations occurring *after* indictment. This finding permits law enforcement authorities to conduct identification procedures prior to the initiation of formal criminal proceedings, without granting the suspect a right to counsel. As one commentator has remarked: "It seems unlikely that police departments and prosecutors will decline the Court's invitation in *Kirby* to dispense with the *Wade-Gilbert* requirements legitimately."[177]

The decision in *U.S.* v. *Ash*[178] is another reflection of the Burger court's retreat from *Wade*. It was held that the Sixth Amendment right to counsel did not require that the accused have counsel present at a post-indictment photographic display identification. The court reasoned that the Sixth Amendment right to counsel did not extend to procedures conducted in the accused's absence. Justice Stewart, in a concurring judgement, applied the *Wade* rationale but considered that photographic displays were generally less suggestive than lineups and easier to reconstruct at trial and therefore counsel was not necessary at these procedures.

This limiting approach was seen again in *Neil* v. *Biggers*.[179] Although the Supreme Court found that the showup procedure used in the case was suggestive and unnecessary (and thus applying the test in *Stovall* v. *Denno* inadmissible), it enunciated the true test to be whether under the "totality of circumstances" the identification was reliable. That is to say, instead of applying a *per se* exclusionary rule, if the confrontation procedure was suggestive, the court applied a test that depended upon an *ad hoc* evaluation of the testimony.

The decision in *Neil* v. *Biggers* seriously undermines the due-process guarantees established in *Stovall* v. *Denno*. Certainly the conclusion reached turns the emphasis away from the reliability of the identification procedure used to the reliability of the particular eyewitness evidence. Thus, such an approach would appear to be detrimental to the task of standardizing pretrial identification methods, and to ensuring their fairness.

Present Practice

Although in most cities the accused may have counsel present at the lineups, police in four cities report that the accused is not so entitled: Halifax, Edmonton, Vancouver and Regina. The lawyer is not allowed behind the one-way mirror in Victoria and Kingston. The police in all cities report that counsel is very seldom present; indeed, in a number of cities, counsel is never present. Some police report that if a lawyer did appear, they would subpoena him or her as a witness.

(2) *Advising Suspect of Right to a Lawyer.* The suspect shall be told: that he or she has a right to have a lawyer present to observe the pretrial eyewitness identification procedure; that if he or she cannot afford a lawyer, one will be provided for him or her free of charge; and that the procedure will be delayed for a reasonable time after the suspect is notified (not exceeding twenty-four hours) in order to allow the lawyer to appear.

(3) *Waiver of Right to a Lawyer.* A suspect may waive the right to have a lawyer present, provided the suspect reads (or has read to him or her), and signs the "Waiver of Lawyer at a Pretrial Eyewitness Identification Procedure" form, or makes an oral waiver heard by at least two other persons. The oral statement must show that the suspect had full knowledge of the effect of waiving the right, and the precise words of the suspect's statement must be made part of the record. The suspect shall be informed that any waiver given may be revoked by him or her at any time.

COMMENT

This guideline requires that suspects be advised in the fullest possible terms of their right to a lawyer. Suspects should be told that a lawyer will be appointed if they cannot afford the fee, in order to prevent indigent suspects from waiving their right because of the possible cost of a lawyer.[180] They should also be told that the proceedings will be delayed while awaiting the presence of a lawyer, so as to make it clear to them that they are occasioning no inconvenience by requesting a lawyer.

Even though suspects are advised of the right to a lawyer, many will undoubtedly waive this right. However, Rule 208(3) attempts to ensure that the waiver is made knowingly and intelligently. Stringent requirements are imposed upon the identification officer to ensure that any waiver be so made.

It could be argued that a lawyer's presence at a pretrial eyewitness identification procedure should be mandatory. Counsel's presence is essential at all procedures for the reasons given in the commentary following Rule 208, and it might be doubted that a suspect in police

custody can intelligently waive this right. Since counsel's function at a lineup is limited to observing the proceedings and ensuring that no suggestive conduct takes place (see Rule 209), there might be no reason why, even if the suspect does not want a lawyer, one cannot be appointed from a list of designated duty counsels.

However, unless funds for duty counsel become more generally available, it would be difficult to justify the expenditure of scarce resources for this purpose. Particularly if these guidelines are implemented, although counsel's presence might be important, it cannot be said to be crucial. A complete and detailed record of the proceedings will be available to defence counsel, and the proceedings will be open to challenge at trial.[181]

Present Practice

At present, no police force advises the suspect of his or her right to have a lawyer at the lineup. Fredericton, Sherbrooke and Halifax, however, suggest that they do so in some cases.

Rule 209. Role of Suspect's Lawyer

(1) ***In General.*** **The suspect's lawyer shall be allowed to consult with the suspect prior to the pretrial eyewitness identification procedure, and to observe the procedure. He or she may make suggestions but may not control or obstruct the procedure.**

(2) ***Lawyer's Suggestions.*** **Any suggestions the lawyer makes about the procedure shall be considered and recorded. Those suggestions that would render the procedure more consistent with these guidelines should be followed. The failure of a lawyer to object to certain aspects of the procedure shall not preclude the accused from objecting to those aspects at trial.**

(3) ***Lawyer's Participation.*** **A lawyer should be permitted to be present when a witness states his or her conclusion about the identity of the suspect. However, the lawyer should be instructed not to address the witness before the procedure and to remain silent while the witness attempts to identify the suspect. The lawyer may speak with any witness after the procedure, if the witness agrees to speak with the lawyer.**

(4) ***Communicating with the Witness.*** **A witness taking part in a pretrial eyewitness identification procedure may be told that he or she is under no obligation to speak with the lawyer, but that he or she is free to speak with the lawyer if he or she so wishes.**

COMMENT

Two reasons were given above as to why the suspect should have a right to a lawyer at an identification test: first, to ensure that there is no possibility of suggestion at the test; and second, to ensure that the identification test can be reconstructed and assessed at trial. What role should a lawyer play at the identification test, in order to ensure that he or she can perform these functions?

The lawyer can discharge the second function simply by assuming the role of a passive observer. Along with the written record of the proceedings, the lawyer's presence and observations at the identification test should ensure that the court is provided with a complete picture of the conduct of the proceedings.

The role the lawyer should play to ensure that the identification test is not suggestive is more troublesome. Obviously the lawyer has to be able to make suggestions to the police in the conducting of the proceedings in order to discharge this function. But what if he or she objects to a particular procedure (the appearance of a number of lineup participants, for example), but the supervising officer disagrees? There are really only two alternatives: the proceedings might be halted and the issue resolved, perhaps by an interlocutory motion to a judge; or counsel's objections might be recorded, the police could continue with the procedure in the fashion they think proper, and the issue could be resolved at trial. In this guideline, this second alternative is recommended.

Resolving an issue of contention before trial would be time-consuming and disruptive to the conducting of the procedure, which often requires the co-operation of a considerable number of members of the public. It would also delay the holding of the identification test. In cases where the police are looking for a dangerous offender and need quick confirmation as to whether they have found the right person, it is important that the identification procedure be held as expeditiously as possible.

Thus, the guideline provides that lawyers may make objections and suggestions but that the police are under no duty to follow them. The only requirement is that they be made part of the record which will be preserved for later reference at trial. Moreover, to protect the accused and to prevent the procedure from becoming unduly contentious, it is provided that lawyers not be obliged either to make objections at the lineup or be deemed to have waived them. That is, the prosecution will be prohibited from arguing at trial that the defence lawyer's previous silence on an aspect of the lineup should be viewed as evidence that the matter involved no impropriety. This latter provision should prevent lawyers from making a series of contentious objections at the procedure,

which, while understandable, would be resented by the police who would view many of them as frivolous. Of course, if counsel does not object to an obviously unfair procedure, at trial a factual inference might be drawn that the procedure did not appear at the time to be unfair. And as the American Law Institute noted in making a similar proposal, "[t]his possibility may be thought to provide just the right degree of incentive for defense counsel to make reasonable objections which the police might heed, rather than sitting back and hoping to trap the police in error."[182]

Part III. Obtaining Descriptions

Rule 301. From Whom

The police shall attempt to obtain a description of the suspect from all potential eyewitnesses. If a potential eyewitness cannot provide a description of the suspect, this shall be recorded.

COMMENT

Requiring the police to obtain a description of the suspect from all potential eyewitnesses recognizes the several valuable purposes that such descriptions serve. First, such a description may assist the police in the apprehension of criminals and remove from suspicion people whom the police might otherwise investigate, but who do not fit the witnesses' description of the offender.

Second, witnesses who had previously described the offender will probably exercise greater caution at subsequent identification proceedings, since their reliability will be attacked if they carelessly identify a person bearing little resemblance to their description of the offender.

Third, descriptions of the offender furnished by witnesses to the police soon after the commission of a crime can play an important role in determining the reliability of an eyewitness identification. The witness's identification might be called into question if there are material discrepancies between the witness's description and the actual appearance of the person whom the witness identifies;[183] if the original description by the witness does not include a prominent and distinguishing characteristic possessed by the person identified;[184] if the witness is unable to offer a

description of the accused, or offers only a vague description, but later purports to be able to identify the person with certainty;[185] or if the description contains details that could not have been perceived by the witness at the original viewing.[186] On the other hand, a prior detailed description which is later confirmed by an identification of the suspect can support the reliability and credibility of the eyewitness's testimony.[187]

A fourth use of descriptions is to test the reliability of subsequent identifications where two or more witnesses have given descriptions of the offender. For example, if the descriptions are quite different, provided that these witnesses possess normal sensory organs and that they observed the accused under roughly similar conditions, it might be apparent that the conditions at the time of the original viewing were such as to render any identification inherently unreliable — the lighting may have been dim, all of the witnesses may have managed only a fleeting glimpse of the accused, or the culprit may have been disguised in some way.[188]

If witnesses are similarly situated and some offer a description of the alleged offender and others do not, the testimony of those who are unable to describe the offender might be relevant in assessing the trustworthiness of the descriptions given by the other witnesses.

Although the case for requiring the police to obtain descriptions from all potential eyewitnesses might appear to be obvious, there are two arguments that might at least cast some doubt on this conclusion.

First, psychologists have shown that many people are very bad at describing appearances, and furthermore, that there is no correlation between a person's ability to describe someone's appearance and his or her ability to recognize that person.[189] Moreover, it has been found that training in giving verbal descriptions of faces does not improve visual recognition performance.[190] In part, this may be because faces are, in the main, recognized on the basis of patterns and configurations rather than specific features, and patterns are extremely difficult to put into words.

These findings suggest that if too much emphasis is placed on the descriptions witnesses give, a court might make too much of discrepancies between the description of the offender and the accused's actual appearance. Overemphasis on discrepancies might lead to the rejection of reliable identification evidence. An emphasis on the witnesses' description might also encourage the courts to give undue weight to detailed descriptions of the suspect's appearance.

However, no matter how real are these concerns, they do not necessarily lead to the conclusion that witnesses should not provide descriptions of the offender. In some cases their description will

nevertheless be important. If the witness failed to mention a salient characteristic of the alleged accused, or mentioned one that the accused did not possess, that evidence would still be important in assessing the witness's reliability. In any event, a description of the suspect might be important in attempting to locate the offender and in constructing an unbiased lineup. The facts that some people are not good at describing appearances, and that there is no necessary relationship between a person's ability to describe someone and their ability to recognize them, are matters that the trier of fact should consider in determining what weight to place upon a particular witness's testimony.

The second concern in this area is, that if verbal descriptions of the offender are taken from witnesses, it might impair their ability to make a subsequent reliable identification. There is some suggestion in the relevant psychological studies that giving a prior description may hinder identification performance. For example, Belbin[191] found that recognition accuracy of complex visual forms is significantly decreased when subjects are first asked to describe the form. Williams[192] found that subject-witnesses, undergoing a questionnaire type of description probe of a mugger in a brief film clip, were less accurate in their identifications of the suspect in a six-photograph lineup than subjects who had not received the description probe. Williams concluded that "[t]he description probe seemed to decrease the accuracy in recognition by serving its major function: to disassemble the witness's memory of the suspect into parts .... [W]hen he [attempts to] reassemble the parts [at the line-up] there will be details changed, distorted, left out or added. This would ... decrease accuracy."[193] Other studies, however, have found no significant differences in identification performance between those witnesses who gave some type of prior description and those who did not.[194]

The apparently disparate findings of these studies might be explained on the basis of the factual differences between the studies. In attempting to reconcile the studies, it would appear that a detailed verbal probe might interfere with the accuracy of a person's identification, if the identification test takes place immediately after the detailed questioning. However, the passage of time seems to alleviate whatever adverse impact verbal description problems might have on a witness's ability to identify the criminal subsequently.[195] It also appears that if the description probe is very detailed, forcing the witness to guess at answers to specific questions about the suspect's appearance, it might affect the witness's ability to recognize the person later. [196] Subsequent guidelines, dealing with the timing of description-taking and the manner of taking descriptions, attempt to ensure that the description probe will not interfere with the witness's ability to recognize the person he or she saw.[197] In some cases at least, a description given immediately after viewing a person might enhance subsequent identification by capitalizing on the witness's short-term memory.

Rule 302. When Taken

The police shall at the first reasonable opportunity obtain complete descriptions of the offender from all witnesses. In all cases, such descriptions shall be obtained before the witness attempts to identify a suspect.

COMMENT

In many cases, descriptions of the offender will be obtained at the scene of the crime. The objection has been made that since, at this point in time, the police are interested in the speedy apprehension of offenders, the imposition of a requirement that they obtain a complete description of the offender might impair the speed and success of their search.[198] However, it seems unlikely that the police would ever be in such need of a hasty description that they could not, at the first opportunity, take a complete description from each eyewitness. The danger of not taking a description at the first opportunity is that the witnesses' perceptions of the person they saw may become tainted by suggestion and perceptual filling-in. The danger of taking only a partial description from a witness is that a person who is asked to repeat a description becomes progressively more certain of the details, but at the same time less accurate.[199]

In some cases, a witness who views a traumatic or emotional event might immediately repress the details of the event and be unable to provide a clear description of the person involved. Later, when the emotion has subsided, the witness is able to produce a fairly detailed description. Although this might be taken to cast doubt on the witness's credibility, these situations are best dealt with as special cases.

In all cases, the description should be taken before the witness identifies the suspect. Otherwise, the witness might simply give as a description the characteristics of the person he or she observed when the suspect was identified. Because of the possible effect that a verbal description might have on a person's immediate ability to identify a person (see the discussion that follows Rule 301), the description should be taken two or three days before the identification test, if at all possible.

Rule 303. Manner of Taking

Descriptions from a witness shall be elicited by questions that evoke the witness's independent and unaided recollection of the offender.

(a) *The Opportunity to Observe.* **First, ask the witness questions about his or her opportunity to observe the offender, including such matters as what directed his or her attention to the person observed, the duration of observation, the distance from the person observed, and the lighting conditions.**

COMMENT

In taking a description from a witness, the police should first ask the witness about the context of the observation. Information about the duration of the observation, the witness's distance from the suspect, the lighting conditions, what directed the witness's attention to the suspect, and the witness's emotional state are of vital importance in evaluating the reliability of the identification.

This information should be obtained from the witness before he or she is asked about the suspect's appearance. In being asked to recount this information first, the witness might, for example, be alerted to the fact that there was very little time to observe the suspect, and might thus not feel obligated to provide the police with a "good" description. If a witness immediately provides the police with a detailed description, and information relating to the circumstances of the observation is obtained later, the witness might feel some pressure to exaggerate this general information in order to bolster his or her credibility.

(b) *A Narrative Description.* **Second, ask the witness to describe the offender in a free narrative form.**

(c) *Specific Questions.* **Third, if the free narrative description is incomplete, ask the witness specific non-leading questions about particular features or characteristics of the offender. However, the witness should be told not to guess about specific details.**

COMMENT

After witnesses have committed themselves to a description of an offender there will be a strong tendency for them to select from the lineup the person who most closely fits the initial description.[200] This applies especially to those witnesses who have inaccurately described the offender. It is therefore of crucial importance that witnesses' initial descriptions be as accurate as possible.

Psychologists have found that witnesses' recall will include fewer errors when they are asked to describe the offender in a free narrative form.[201] This would suggest that police should simply ask witnesses to give descriptions in their own words. However, these same studies show that free recall results in extremely incomplete descriptions.[202] To obtain useful descriptions, it is therefore often necessary to ask specific questions about particular features of the offender; but while the completeness of the description increases as questions move from the general to the specific, its accuracy decreases. Thus the best method of obtaining a description is first to ask witnesses to describe freely the person they

saw. This information is very likely to be accurate. Then, in order to increase the completeness of the witnesses' reports, a series of specific questions can be asked. Asking a general question first will not only ensure that information as accurate as possible is recorded; it will also prevent witnesses from incorporating into their free narrative information learned from the questioner.

Elizabeth Loftus, a psychologist, illustrates with the following scenario the danger of asking specific questions before inviting a general narrative:

> For example, suppose a bystander has witnessed a crime, has described everything he can remember in a free report to the police, and is then asked some specific questions, such as: "Was the intruder holding a gun?" At that point the witness may remember the gun and may include a description of it, even though he had initially forgotten to mention it. But if the witness is asked specific questions before his free report, such as "Did you see a gun?" he will probably say no if no gun existed, but when later asked to "tell us everything you remember about any weapons," the witness might say to himself: "Gee, I remember something about a gun. I guess I must have seen one. It was probably black".[203]

To guard against error as much as possible, the specific questions asked should not be leading and the witness should be discouraged from guessing at the answer.

All studies agree that leading questions can seriously distort a witness's description.[204] One psychologist[205] has conducted several interesting studies which show how dramatically even the slightest changes in the wording of a question can affect a witness's response. For example, a witness who is asked, after viewing a film of an automobile collision, whether he saw "the" broken headlight is significantly more likely to report seeing this non-existent item than a witness who, after having viewed the same film, is asked whether he saw "a" broken headlight.[206] Another experiment showed that estimates of the height of a basketball player varied on average by 10 inches, depending upon whether the witness was asked to estimate "how tall" as opposed to "how short" the player was.[207] The implications of these studies for police description-taking are clear. Caution must be taken so as not to put a question to the witness which, by its very form, will affect the response. Thus, for example, a witness who does not mention the offender's height in his or her free narrative description should be asked to "estimate his height" rather than be asked "how tall was he?"

Witnesses who guess at the answer to specific questions in giving a description are more likely to be unreliable in making a subsequent identification than those who do not.[208] A witness who guesses at a particular aspect of someone's appearance is likely later to forget that the response was a guess, and will simply incorporate this feature into his or

her memory of the person and, over time, will become increasingly certain of it.

Studies have shown that an intensive concentration on minor details of a person's appearance interferes with recognition memory.[209] Thus, witnesses should not be pressured into answering detailed questions about a person's appearance. The questioning should be general, and should focus on easy or obvious physical features.

(d) *Confidence in the Ability to Identify.* **Fourth, ask the witness how certain he or she is that he or she will be able to identify the offender.**

COMMENT

Common sense would suggest that the more confident witnesses are in their ability to recognize the suspect, the more likely it is that their identification will be accurate. No psychological studies have tested this hypothesis. However, there are numerous studies on the relationship between peoples' confidence that they have correctly identified a person and the accuracy of their identification. Some of these studies show a positive relationship between confidence and accuracy; others reveal none.[210]

Whatever the relationship between confidence and accuracy, there is still some value in obtaining from witnesses a statement soon after the time they originally viewed the suspect, as to how confident they are that they will subsequently be able to identify the person. It might be that before witnesses have been influenced by extraneous factors, their own judgement as to how likely it is that they will be able subsequently to identify the person is probative in assessing their evidence. A discrepancy in the degree of confidence at any time might call for an explanation.

Rule 304. Officer to Take Description

If practical, when there is more than one eyewitness, a description of the suspect shall be taken from each witness by a different officer, each of whom is unfamiliar with the description given by other witnesses and the general description of the suspect.

COMMENT

A series of psychological experiments have shown how subtle differences in the form of a question can influence the response.[211] A

police officer who is aware of the description given by one witness may, by the wording of a question, unintentionally lead a second witness to give a description similar to that given by the first. Therefore, where there is more than one witness, a different officer should take the description from each witness. This will reduce the possibility that a witness will unconsciously be influenced by what the officer may have learned from questioning another witness.

In many cases a shortage of police manpower may prevent compliance with this precaution. Also, at the scene of the crime, for example, police officers would have no motive for attempting to elicit the same description from each witness. Therefore, separate police officer should be used only when practical.

Part IV. Use of Sketches and Composites

Rule 401. Use of Non-Photographic Pictorial Representations

When there is no suspect, and the use of photographs has been or is likely to be unsuccessful, a non-photographic pictorial representation (e.g., free-hand sketch, identi-kit or photo-fit) may be used to assist in identifying a suspect. If such a representation leads to the identification of a suspect, no other sketch, composite or photograph should be displayed to any other witness; instead, witnesses should be required to attend a lineup. In addition, the witnesses who took part in constructing the non-photographic pictorial representation should be required to attend a lineup for the purpose of testing the identification of the suspect.

COMMENT

The purpose of this rule is to sanction the use of non-photographic pictorial representations by the police where there is no suspect, thus making the holding of a lineup or confrontation impossible, and photograph identification probably unsuccessful. In these circumstances, the fact that such representations may not be as effective as other procedures in leading to identifications is outweighed by the interest in law enforcement.

The general label "non-photographic pictorial representation" encompasses a variety of techniques employed by police for the purpose of obtaining identifications of suspects.[212]

One of the most common forms of such representations is the police artist's sketch or drawing. The witness describes the person alleged to have committed the crime to a police artist, who prepares a sketch which conforms to the witness's description.

An early form of composite used to reconstruct faces is called the identi-kit. It consists of over 500 transparent celluloid sheets portraying different facial features such as hairlines, eyes, chins, noses, ears and beards, drawn by an artist from a large number of photographs. Particular transparencies are chosen to conform, as much as possible, to the witness's description, and a composite face is constructed.

More recently, however, the identi-kit has been replaced in many police departments by the photo-fit, which was invented by a Canadian, Jacques Penry, in conjunction with the British police. This type of composite consists of separate photographs of five facial features (eyes, mouth, nose, chin, and foreheads or hair).[213] From a great number of alternative photographs, features are "mixed and matched" in an effort to construct a face. Facial accessories such as beards, moustaches, hats and glasses may also be added. A fully assembled face can be altered or enhanced by substituting or adding other features.

The relative reliability of these different forms of non-photographic pictorial representations has been the subject of much debate. The reliability of the artist's sketch is ultimately dependent upon the accuracy of the communication between the witness and artist.[214] This accuracy may be reduced by suggestion. Repeated constructions may confuse witnesses to the point where they cannot distinguish between the artist's increasing number of pictures and their own changing memory image of the suspect's face. There is also the constant underlying doubt as to witness's ability to describe a face accurately.

By comparison to artist's drawings, composite kits cannot, even under the best of conditions, result in a completely accurate picture of the suspect. Studies have reached the conclusion that artists' sketches tend to be better representations of real faces than identi-kit composites, probably because of the fundamental deficiency of a composite technique of identification.[215]

The increasing use of photo-fits has led to a number of studies concerning their efficiency.[216] It has been found that photo-fits are more likely to lead to identifications than identi-kits, presumably because

photographs of parts of actual faces are more conducive to identifications than the relatively artificial outline features used in identi-kits.[217]

Even though these three basic forms of non-photographic pictorial representations might be unreliable, in some circumstances there are simply no alternatives to their use. Furthermore, the dangers that might arise because of their unreliability are minimized to some extent by the fact that the reliability of particular representations will be subject to verification if they lead to the identification of a suspect. The rule provides that, in this case, the original witnesses should be asked to attend a lineup in which the suspect is a participant. Recent studies have suggested that the construction of a photo-fit has little effect on a person's ability to recognize the suspect later.[218]

Case Law

In *R.* v. *Riley (No. 2)*[219] the witness assisted the police in compiling an identi-kit photograph which was then tendered as evidence of identification. This evidence was held to be relevant and admissible:

> [E]vidence can be given of identification in the course of a line-up, and evidence can be given that the witness selected a photograph of the accused.... It would seem to be that it would also be permissible for evidence to be given that the witness had selected, for example, a sketch of the accused...on the same basis, I think that the identi-kit photograph is the selection of the witness of a number of different aspects of the head and face shown in the identi-kit photograph....[220]

The photo-fit composite picture has also been introduced as evidence of identification at trial.[221]

Present Practice

In London, a sketch or composite is considered, more often than not, to be simply confusing to everyone involved in the investigation. However, if some form of representation is necessary, an artist's drawing is used; identi-kits or photo-fits are never used. In Ottawa, artists' drawings and composites are used fairly regularly. Identi-kits tend to be used more often than photo-fits. In Toronto, when identification is at issue, all witnesses who have indicated that they might be able to subsequently identify the offender are asked to construct a composite drawing of the offender, through the use of an identi-kit. The identi-kit sketches are always made part of the record. Artists' sketches are never used in Toronto. In Kingston, artists' drawings are used in the more serious cases, and where the witnesses, by their previous descriptions, have indicated that they had a fairly good look at the offender.

The police in Calgary report that identi-kits are not as flexible as artist's drawings but are used when a suitable artist is not available. The

police in Fredericton report that the composite kits are used in about 30 per cent of the cases. The police in Newfoundland, Montréal and Sherbrooke report that the composite techniques are used in a small percentage of the cases. The police in Saint John, Vancouver and Edmonton report that sketches of composites are never used.

Most cities report that all eyewitnesses would be asked to compose a representation of the person they saw, but that they would be asked to do so separately.

Part V. Lineups

Rule 501. Lineups Shall Be Held Except in Special Circumstances

In all cases in which an identification of a suspect by a witness may be obtained, a lineup shall be held, unless one of the following circumstances makes a lineup unnecessary, unwise or impractical:

COMMENT

A number of procedures may be used to test whether eyewitnesses can identify a police suspect as the person they saw at the scene of the crime. These procedures most commonly include a confrontation, an informal viewing, a photographic display, and a lineup. Under these guidelines, unless a lineup is unnecessary, unwise or impractical for one of the reasons ennumerated in Rule 501, a lineup must be used as the test for determining whether eyewitnesses can identify the police suspect.

The lineup (or the "identification parade" as it is called in Great Britain and a few other Commonwealth countries) appears to be the most reliable and fairest means currently used to test the ability of eyewitnesses to identify the person they saw.[222] In this comment, the reasons why a lineup is preferred over a confrontation, an informal viewing or a photographic display are discussed.

Confrontations vs. Lineups

A confrontation or show-up consists in presenting a single suspect to an eyewitness, and then asking the witness whether he or she can identify

the suspect as the offender. In some cases the suspect will be in the custody of the police, and handcuffed. This is obviously the most unsatisfactory method of pretrial identification. Witnesses who confront a person in police custody will find it difficult to resist the almost overpowering suggestion that the police suspect that person of being the offender, and might abandon their judgment to that of the authorities. If the suspect bears even the slightest resemblance to the witnesses' mental image of the offender, uncertainties in the witnesses' mind may be resolved by altering their mental picture of the offender to one more closely fitting the accused. This is particulary true in cases where witnesses consider it their public duty to assist the police in whatever way possible; where witnesses feel an extraordinary need to show appreciation and gratitude for all the time and effort the police have devoted to finding the criminal; where witnesses are particularly retributive and will not be satisfied until someone has been convicted and punished; or where the witnesses find the aftermath of the crime so emotionally disturbing that they simply wish the identification procedures to end. Under these guidelines a confrontation is prohibited except in very rare circumstances: see Part VIII.

Case Law

The courts in virtually all common-law jursidictions have condemned the unnecessary use of confrontations as a method of identification. For example, in England, in a case in which two accused were identified while standing alone at the police station, Phillimore J. of the English Court of Criminal Appeal commented: "Such methods as were resorted to in this case make this particular identification nearly valueless, and police authorities ought to know that this is not the right way to identify."[223]

In an Australian case[224] two witnesses to an assault were shown the accused in a room at the police station where the only other people present were police officers. The court noted:

> It has long been the experience of judges that evidence, as to the recognition of an accused person, in a dock, or, in a police station alone, or in company with police officers, is open to grave objection. For to see an accused so situated is to observe him in such incriminating circumstances, as to suggest to the witness that the prisoner is in fact the offender or was believed by the authorities to be the offender. Prejudice to the accused is unavoidable.[225]

The court went on to consider the effect of the identification procedure upon the value of the identifying witnesses' evidence:

> It has been held by the High Court that if a witness, whose previous knowledge of the accused has not made him familiar with his appearance, has been shown the accused alone as a suspect and has, on that occasion, first

identified him, the liability to mistake is so increased as to make it unsafe to convict the accused, unless his identity is further proved by other evidence direct or circumstantial.[226]

The attitude of Canadian courts is similar to that of the courts in England and Australia. In a case involving the display of one photograph, the Ontario Court of Appeal stated: "Anything which tends to convey to a witness that a person is suspected by the authorities, or is charged with an offence, is obviously prejudicial and wrongful. Submitting a prisoner alone for scrutiny after arrest is unfair and unjust."[227]

In the Commonwealth jurisdictions discussed, the courts have been unanimous in stating that a confrontation is an improper method of identification.[228] A conviction obtained by the use of such identification evidence will be quashed, unless there is strong independent evidence of guilt.[229]

Early case law in the United States suggested that, if the police hold a show-up, evidence of all pretrial identification should be excluded on the grounds that the accused was denied due process of law. The in-court identification should also be excluded unless an "independent source" for such an identification is established. In *Stovall* v. *Denno*[230] the United States Supreme Court held that the issue was whether the confrontation "was so unnecessarily suggestive and conducive to irreparable mistaken identification"[231] as to be a denial of due process of law. In this case, the court found that the particular confrontation was not a denial of due process, since the only eyewitness was dying in the hospital. Thus, while the confrontation was suggestive, it was not "unnecessarily" so because of the circumstances.

The implication of the *Stovall* decision seemed to be that if a confrontation was held and there was no "necessary" reason for holding it, there was a *per se* violation of due process. Subsequent Supreme Court decisions have, however, changed the focus of the test to be applied. In *Neil* v. *Biggers*[232], the court emphasized the reliability of an identification made by way of a confrontation rather than its potential for suggestiveness. The majority of the court implied that it is not the denial of fundamental fairness, but "the likelihood of misidentification which violates a defendant's right to due process."[233] Indeed the majority held that the "central question" was whether "the identification was reliable even though the confrontation procedure was suggestive."[234] The court listed five factors to be considered in determining reliability (and hence admissibility) of admittedly suggestive eyewitness confrontations: the opportunity of the witness to view the criminal at the time of the crime; the witness's degree of attention; the accuracy of the witness's prior description of the criminal; the level of certainty demonstrated by the witness at the confrontation; and the length of time between the crime and the confrontation.

Subsequent cases have confirmed that evidence of an identification made at a confrontation will not be excluded if the evidence might be reliable because of the factors mentioned above.[235]

Present Practice

Canadian police departments generally report that they will only hold a confrontation in exceptional circumstances. See the discussion of present practices in Part VIII.

Informal Viewing vs. Lineup

Another identification procedure sometimes used by the police is to place the suspect among a group of people in a natural setting (for example, a bus depot, courtroom, or police station lobby), and invite the eyewitness to pick the person he or she saw. Generally, the suspect will be unaware of being observed.

This type of informal identification procedure might appear to have a number of advantages over a lineup. First, it has the possible advantage of presenting the witness with a much larger number of people to choose from than is possible at lineups. This will be particularly true if the viewing location is, for example, a large courtroom or busy bus depot. Second, suspects and other people at the viewing location will not know that they are being observed and will, therefore, be more likely to act normally. In a lineup, suspects might draw attention to themselves through nervousness. Distractors, because they are likely to know who the suspect is, might unconsciously convey this information to the viewing eyewitnesses by, for example, standing a slightly greater distance from the suspect. Third, in an informal viewing the conditions under which the original observation took place might be more closely simulated. Fourth, if the police tell witnesses that the suspect may or may not appear at the location, the witnesses will not be as inclined to make an identification just because they believe it is expected of them.

However, in spite of these apparent advantages, an informal viewing potentially violates each purpose of these guidelines: it does not permit the suspect to exercise his or her rights; it cannot be controlled to ensure that it is not suggestive; it is difficult to reconstruct at trial; and the conditions might be unfavourable for a witness to attempt to make an accurate identification. Each of these objections will be discussed in turn.

First, some subjects will be unaware that informal viewing procedures are taking place. Therefore, they will necessarily be denied the right to counsel and the ability to ensure that the procedures are conducted fairly and in an unsuggestive manner.

Second, the police will not be able to exercise control over what takes place at the viewing location. Thus the suspect may unwittingly engage in some form of behaviour that may tend to attract the witness's attention. Furthermore, the police will be unable to control the type of distractors; thus there can be no assurance that the distractors in an informal viewing will possess the same distinctive features or mannerisms as the suspect. Lineups, by contrast, can be controlled in order to eliminate any conditions that might bias the witness towards identification of the accused.

Third, it will not be possible to describe precisely either the number and appearance of the other people present at the viewing location, or the general manner in which it was conducted. The court, therefore, will be unable to review the fairness of the circumstances under which the accused was identified. This is unlike a lineup, which can be photographed and the procedure accurately described.

Fourth, the witness will not be permitted to examine closely each person who appears. It may be too much to expect a witness to identify the suspect who is perhaps seen at a distance for a brief period of time. Yet, the jury may tend to place considerable weight upon the fact that the witness saw the accused and did not make an identification. Furthermore, witnesses who mistakenly identify someone under these poor conditions may afterwards be reluctant to admit their mistake, even though closer observation reveals less resemblance than was originally thought. The witness will thus tend to concentrate upon the similarities and minimize any dissimilarities between the accused's appearance and the witness's mental picture of the offender.

Finally, there is a danger that a witness may observe the suspect at the viewing location, and even though he or she does not make an identification, the witness may have unconsciously formed an image of the suspect. At a subsequent identification proceeding or at trial, the witness may experience some recognition and superimpose the image of the suspect acquired at the viewing location upon the more distant and uncertain image of the offender.[236]

Thus, although an informal viewing may offer a few apparent advantages over the more formal lineup, on balance, the lineup is by far the better method of testing an eyewitness's reliability.

Present Practice

Informal viewings are frequently used by some police departments. For a description of the present practice with respect to informal viewings, see the discussion under Part VIII.

Photographs v. Lineups

It is understandable that in the nineteenth century the lineup would be regarded as the most reliable method of identifying suspects; there was really no alternative. However, modern police forces have access to vast numbers and types of photographs from which stringent identification tests can be constructed. Thus, the question of whether the lineup is simply an anomaly, preferred by the criminal justice system because of tradition, is a serious one. In this section, the merits of live lineups are compared with those of photographic displays.

(a) Why Photographic Displays Might be Preferred to Lineups.

First, with a photographic display there are no cues as to whom the police suspect. In a lineup, on the other hand, there are at least two sources of cues from the lineup participant that a witness might use in selecting the police suspect. First, if the suspect displays nervousness while the distractors are calm, the witness may identify the suspect on this basis. The extent to which this occurs is unknown: in many lineups, distractors, simply because of the strangeness of the surroundings, might display considerable anxiety. Conversely, many suspects may display few signs of nervousness in this setting. A second source of cues for the witness might be the behaviour of the distractors. They might unconsciously behave so as to direct the witness's attention to the suspect. They may, for example, look at the suspect out of curiousity about his or her reaction to the presence of the witness, or they may feel uncomfortable about being so close to a suspected criminal, and respond by standing slightly further away from the suspect than from the other participants. In some cases this danger can be controlled for. In Rule 505(7) it is recommended that this danger be controlled by ensuring that the lineup distractors do not know who the suspect is. Where the participants do know who the suspect is, perhaps this danger can be controlled to some extent by a careful instruction.

Second, a photographic display might be preferred to a lineup because witnesses at lineup procedures might feel under pressure to make quick identifications, so as not to waste the time of the distractors. On the other hand, an appropriate caution to witnesses, as required by Rule 205(b), should ensure that they feel comfortable in making an unhurried identification.

Third, witnesses might experience anxiety at the prospect of having to identify a suspect personally, particularly if they fear retaliation. A photographic display permits a witness to make an identification in a relatively relaxed environment. Rule 505(13) would alleviate this anxiety at lineups, by permitting the use of one-way mirrors.

Fourth, in a lineup the police are limited by the practical consideration as to how many distractors they can present — the usual number will be around eight. Normally, a much larger number of photographs similiar in appearance to the suspect can be located. Thus, a more challenging test of the witnesses' ability to pick the suspect out of a group can perhaps be constructed using photographs. However, although it is impossible to determine the optimal number and kind of distractors in a fair identification test, there is evidence that suggests that properly conducted live lineups provide a fair test of the witnesses' ability.[237]

Fifth, it is alleged that forming lineups is time-consuming, expensive for the public, and inconvenient for the distractors; and that a photographic array can be assembled with little expense or inconvenience. However, most lineups do not take long to assemble; less than two hours is required in most cases. Distractors do not appear to be unduly inconvenienced. Indeed, holding a live lineup is another way in which the public can become involved in the administration of criminal justice.

Although these disadvantages of a lineup over a photographic display would not appear to be overwhelming, they would swing the balance in favour of photographic displays, if lineups had no compensating advantages.

(b) Why Lineups Might be Preferred to Photographic Displays.

First, the most important reason for preferring lineups over photographic displays is that they appear to be a more accurate method of identification. A number of studies have reported that subjects find it easier to recognize suspects in a lineup than they do in a photographic display.[238] These studies confirm what would appear to be a commonsense judgment. A lineup provides more dynamic cues to aid identification than a photographic display does. All people possess a number of personal distinguishing features which are noticeable to those who view them "in the flesh", but which cannot be accurately reproduced through photographic techniques. The fine details of complexion, including skin tone, texture, and blemishes, will not generally appear in photographs. In addition, any single photograph allows a view of the suspect's face as seen from only one angle and at a certain distance. On the other hand, corporeal identification allows the witness to study the suspect from a variety of angles and distances, and permits the recognition of certain habits and mannerisms, such as excessive eye-blinking or twitching of facial muscles, which would not be discernible in a photograph.

Second, in addition to being generally more reliable, lineups are preferable to photographic displays because they are more flexible. Suspects can be asked to perform various gestures and bodily movements which might help the witnesses in confirming their identification. Lineups

also allow the appearance of the participants to be altered to conform more closely to that of the alleged appearance of the person seen at the scene of the crime. For example, the participants can be asked to don special clothing or eyeglasses similar to those worn by the offender.

Third, lineups are preferred to photographs because the procedure takes place in the presence of the suspect. This serves as a restraint on the manner in which the suspect is presented to the witness for identification. The police will probably be far more careful about avoiding suggestive behaviour if the suspect is present at the proceedings. If improprieties do occur, the accused will be able to raise them at trial. Particularly in view of the importance of the identification test, since witnesses usually cling tenaciously to their original identification, it seems in keeping with the most fundamental notions of justice that the accused should be permitted to be present when a witness, in effect, first accuses him or her of having committed a crime.

Fourth, there is also some danger that witnesses who view a photographic display will be less careful in their identification than would be the case at a lineup. Witnesses viewing a lineup are usually aware of the fact that some of the participants are law-abiding members of the public. They will therefore exercise more caution in viewing a lineup than they would while looking through an album containing photographs of convicted criminals.

Finally, lineups are preferable to photographs for the reason that if evidence from a photographic display is presented at trial, the jury might infer that the police had a photograph of the accused because she or he had a criminal record. Most people know that the usual practice is for the police to show witnesses a series of photographs or "mug shots" of people who have been arrested or convicted in the past. These mug shots are contained in police albums commonly referred to as the "rogues' gallery". The prejudice against the accused by virtue of the jury's believing that he or she has been previously convicted of a crime obviously compounds the danger of wrongful conviction. The use of photographic displays allows the prosecution indirectly to put before the jury evidence that could not be offered in chief, namely the fact that the accused had a record of a previous conviction.

A weighing of the relative merits of photographic displays and lineups as techniques of identification leads to the conclusion that the police should conduct lineups whenever possible. In some instances a photographic display might be more appropriate; for example, where the suspect has radically altered his or her appearance, the suspect is uncooperative, or where for some reason distractors cannot be obtained. In these limited cases, photographic displays are permissible under these guidelines: see Rule 501.

As stated in the introduction to this paper, this conclusion can only be reached tentatively on the basis of our present knowledge. It might well be that since by using photographs the police are able to obtain so many more and better distractors, therefore photographic displays are a much better identification test than lineups. This might particularly be the case if the kinds of photographs used were of three-quarter poses and of otherwise-provided optimal viewing conditions. Unfortunately, it would be extremely difficult to determine this question empirically. Therefore, in this paper at least, it is recommended that the traditional identification test be retained.

Case Law

In a number of reported Canadian cases, the police have held photograph displays in situations where it appears that lineups could have been conveniently arranged, and the judges have not commented adversely on the failure to hold a lineup.[239] But in other Canadian cases, judges have expressed concern that when a photographic display is used, the trier of fact often infers that the accused has a previous record, and therefore these judges have encouraged the use of lineups. In a number of Commonwealth cases, judges have expressed dissatisfaction when the police have held a photographic display in a situation where a lineup could have been conducted. In *R.* v. *Seiga*[240] the witness was shown an array of photographs even though the accused was under arrest at the time. The English Court of Criminal Appeal commented that "this court in the absence of any explanation cannot but regard the conduct of the detective constable as unsatisfactory."[241] Similarly, in *R.* v. *Bouquet*,[242] the police showed photographs of the accused, who was being held in custody. The New South Wales Court of Criminal Appeal commented that "[a] personal identification parade should be employed except special circumstances."[243] In a recent case decided by the New Zealand Court of Appeal,[244] the court stated that "...only in exceptional cases should photographs be used at a stage when some particular person is directly suspected by the police and they are able to arrange an identification parade or some other satisfactory alternative means whereby the witness can be asked directly to identify the suspected person."[245]

Present Practice

Barring exceptional circumstances, most cities use a lineup whenever identification is at issue, particularly if the case is a serious one. However, in Hamilton and London, photographic displays are routinely used in place of lineups. In Ottawa, a lineup is held in virtually every case.

(a) *No Particular Suspect.* **The police have no particular suspect.**

COMMENT

Only rarely will a witness's description of the offender be detailed enough to enable the police to narrow their search to only a few possible suspects. Thus, if the police do not have a suspect, a common law enforcement technique is to have a witness look through a series of photographs of previously-convicted persons in order to attempt to identify the person. The police might select photographs of persons who fit the description given by the eyewitness, of persons convicted of similar crimes, or those who, for some other reason, might be suspect. Obviously, in these cases the police cannot go to the inconvenience and expense of requiring all these people to attend a lineup. To prohibit the showing of photographs to witnesses in these circumstances would impose an unacceptable burden on the police's search for the criminal. Consequently, this exception provides that a lineup is not mandatory (and therefore the police may show photographs) where they have no particular suspect.

A lineup will be required if the police have a particular suspect, even though they might not have sufficient evidence to justify an arrest. It has been suggested that, in these circumstances, the police should also be able to show photographs to witnesses. However, when the police suspect that a particular person may be responsible for a crime, they should seek to confirm their suspicions in a manner that most effectively guards against the danger of misidentification. They should, accordingly, ask the person whom they suspect whether he or she would be willing to appear before the witness in an identification lineup. Only if the suspect refuses to participate should consideration be given to employing either some less formal method of corporeal identification or a photographic array. In addition, a rule that would permit the police to hold a photographic display when they had a suspect, but not sufficient evidence to arrest, would be difficult to enforce, since it would require the determination of whether the police did, at that particular point in time, have sufficient evidence to arrest.

Case Law

The courts have been unanimous in approving the police practice of showing photographs to witnesses when they do not yet have a suspect.[246] Indeed, a number of cases suggest that it is proper for the police to show photographs to witnesses where they suspect a particular person, but do not yet have sufficient evidence to justify an arrest. For example, the Court of Criminal Appeal of Queensland has stated that:

> When the police suspect a particular person has committed an offence, it is quite legitimate for them to show a collection of photographs including a photograph of the suspect to persons who may be able to assist in the identification of the offender ....[247]

(b) *Lack of Distractors.* **It is impractical to obtain suitable distractors to participate in a lineup because of the unusual appearance of the suspect, or for any other reason.**

COMMENT

A lineup will only fairly test whether the police suspect is the person that the witness saw, if the suspect is placed in a lineup composed of a number of similarly-appearing persons. Otherwise the police suspect will simply be too obvious. Thus Rule 505(4) requires that "[t]he significant physical characteristics of all persons placed in a lineup should be approximately the same." However, in some cases the suspect's appearance will be unique, making it impossible to assemble a suitable number of similarly-featured people willing to participate in a lineup. For example, the suspect might be very tall or very short, very young or very old, or the suspect's hair length or facial features may be unusual. If the suspect is of a particular racial origin, it may be impossible, in some communities, to obtain participants of the same race, either because they are not present in the community or because they are unwilling to participate. In these circumstances, the witness's attention would be drawn to the suspect's unique appearance; therefore, holding a lineup would not serve any purpose.

In some cases, the police will be able to proceed with a lineup by disguising a distinguishing feature possessed by the suspect which, if left uncovered, would tend to attract the witness's attention. For example, a suspect who has a prominent scar on his or her cheek may have a bandage placed over it. Of course, all the other participants would have a similar bandage placed on their cheeks. Rule 505(5) provides for such a procedure in conducting lineups.

However, if it is impossible to obtain suitable lineup distractors, some other form of recognition test should be used. In most cases, a photographic display would be the possible to find the requisite number of similar-looking people (for example, people of the same race) from a mug shot file; photographs might not reveal the suspect's distinguishing characteristic (for example, that the suspect has only one arm); and in some cases, it might be easier to disguise distinguishing features that the suspect possesses since photographs can be retouched.

Present Practice

The police in most cities report that they would not hold a lineup in these circumstances. Halifax and Vancouver police report that in some cases (about 25 per cent) distractors are not available because of the reluctance of certain racial or ethnic groups to co-operate with the police.

(c) *Inconvenience.* **The suspect is in custody at a place far from the witness; or, for reasons such as sickness or disability, it would be extremely inconvenient to require the witness or the suspect to attend a lineup.**

COMMENT

It is possible to conceive of situations (for example, where the witness and suspect are located in different provinces) where to arrange a lineup would be costly and time-consuming or otherwise inconvenient. In such circumstances, a photographic display should be used. Lineups are, of course, always more inconvenient to hold than photographic displays, but the guideline makes it clear that lineups can be dispensed with for this reason only in exceptional cases.

Another obvious situation in which the guidelines provide that a witness might be shown a photographic array in lieu of a lineup is when he or she is, through illness or other cause, incapable of attending the lineup. The propriety of this practice will depend upon the urgency of securing an identification.

Case Law

Although there are no cases directly on point, since lineups are not normally required under Canadian jurisprudence, photographic displays have been expressly sanctioned in cases where it would be highly inconvenient to hold a lineup.[248]

(d) *Emergency.* **Awaiting the preparation of a lineup might prevent the making of an identification; for example, when the witness or suspect is dying.**

COMMENT

It is clear that if a witness is in immediate danger of death or blindness, and some form of identification can be made immediately, a lineup should be dispensed with. In such a case, normally a confrontation will be held: see Rule 801.

(e) *Lack of Viewers.* **The witness is unwilling to view a lineup.**

COMMENT

Most police forces now use one-way mirrors, and therefore there is little justification for witnesses being reluctant to view a lineup, since they will not personally have to confront the suspect. The *Devlin Report* proposed that the police be given the power to issue a summons to witnesses to require them to attend a lineup. However, because this problem arises infrequently in Canada, this power would appear to be unnecessary. Furthermore, in the few instances where a witness might be unwilling to view a lineup, for example, where the police do not have facilities with a one-way mirror, and the witness is too terrified to confront the suspect because he or she has been the victim of a violent crime, it does not seem wise to compel the witness to do so. A photographic display should normally be arranged in such circumstances.

Present Practice

Police from all cities report they have one-way mirrors and that the problem of witnesses refusing to attend the lineup rarely arises. When it arises, it is because the crime is a minor one and the witness does not want to be troubled; the witness is not affected in any way by the crime and does not want to become involved; or, the witness is an elderly victim of a violent crime or otherwise concerned about pursuing the matter.

(f) *Uncooperative Suspect.* **The suspect refuses to participate in a lineup or threatens to disrupt the lineup.**

COMMENT

Obviously, a lineup should not be held if the witness's attention will be drawn to the accused. It would not achieve its purposes in such a case, since the tendency of most witnesses would be to identify the person to whom their attention is particularly attracted. A clear instance where it would be prejudicial to place the accused in a lineup would be if he or she refused to co-operate: an unwilling lineup participant would be liable to draw the particular notice of the viewer. Although it has been suggested that it might be possible safely to compel a suspect to appear in a lineup by instructing the other participants to act out signs of resistance similar to those displayed by the recalcitrant suspect, the practicality of such a proposal is doubtful and, in any case, there would be a danger that the confusion arising out of such a demonstration might seriously impair the witness's ability to make an accurate identification. Moreover, such a

procedure unduly infringes on the dignity of the distractors. The question of what consequences should flow from the accused's refusal to participate in a lineup is fully discussed under Rule 504.

Present Practice

See comment following Rule 504.

(g) *Suspect's Whereabouts Unknown.* The suspect's whereabouts are unknown and there is no prospect of locating him or her within a reasonable period of time.

COMMENT

Another situation in which it is impossible to hold a lineup is where the police have a definite suspect whose whereabouts are unknown. The police could, of course, be required to wait in such cases until the suspect is apprehended, before asking the witness to attempt an identification. However, this may involve a lapse of months or even years, during which the witness's recollection of the offender's appearance may become vague and distorted. As a result, the witness may be unable to identify, or may be more inclined to misidentify the offender. Consequently, when the suspect's whereabouts are unknown, and there is no prospect of locating him or her within a reasonable period of time, a photographic display should be conducted, if possible.

Case Law

An illustration of the circumstance covered by the rule is provided in *Astroff* v. *The King*.[249] The police had seized some narcotics from an apartment. The name Cecil Wilson appeared on the door. The police showed a photograph to two employees of the apartment building who each identified it as the occupant of the apartment, Cecil Wilson. Two years later he was arrested in New York. The court stated that "no injustice was done the accused by this method of identification."[250]

(h) *Altered Appearance.* The suspect's appearance has been materially altered from what it was alleged to be at the time the offence occurred.

COMMENT

The suspect may, between the time of the offence and the conducting of the pretrial identification proceeding, alter his or her appearance in a

material way. For example, he may remove his beard, or grow one. Studies have shown that changes in the appearance of a face can reduce the probability of recognition almost to chance.[251] In cases where the police possess a photograph of the suspect before his appearance was changed, a strong case can be made for submitting the witness to a photographic, rather than a corporeal, identification test.

In some cases it is possible to prevent the suspect from altering his or her appearance. If it is thought that the suspect might remove his beard, for example, the police might attempt to prevent him from shaving. It has been suggested that the police should be given such authority. However, such actions would be a serious infringement on the suspect's right to privacy. Therefore, it is not recommended that the police be given this power. In any event, a suspect is likely to be deterred from seriously altering his or her appearance since a court may, in such circumstances, view the suspect's behaviour as indicative of guilt.

Case Law

Most of these issues raised by this rule have never been considered by Commonwealth courts. In an Indian case, however, it was suggested that the authorities be given considerable power to prevent suspects from making their identification more difficult:

> Beards or clean-shaven faces furnish frequent cause for trouble, for sometimes in order to avoid recognition a bearded criminal after committing the crime gets himself shaved, or vice versa. It is notoriously difficult to recognise a bearded man who has got himself shaved, or a clean-shaven man who has grown a beard. If therefore the Magistrate comes to entertain good cause for the belief that the suspect has indulged in such a trick, it is open to him to defer the identification of the clean-shaven suspect until he has grown a beard of the appropriate size, or to get the bearded suspect shaved.[252]

Present Practice

Some police forces report that when a suspect's appearance has changed drastically, they will use a photographic display if they have a photograph of the suspect that was taken before the change. Most forces however, reported that if the suspect's appearance has not changed too drastically, they will still hold a lineup. In Ottawa, the police recounted an incident in which a suspect had pulled out his mustache; they still went ahead with the lineup. But they said that if the suspect's appearance has changed drastically, they might simply use a show-up. All of the police forces reported, however, that they were not too concerned about drastic changes in the suspect's appearance; they felt that this would be good evidence to use against the accused.

Rule 502. Avoiding Exposure Prior to Lineup

Prior to a lineup, a witness shall not be allowed to view the suspect, or a photograph or other representation of the suspect, except as expressly permitted by these guidelines.

COMMENT

If the police do not have a suspect, or for one of the other reasons mentioned in Rule 501, a lineup need not be held, it is, of course, quite proper for the police to show photographs to witnesses. However, if a lineup is required to be held under Rule 501, it is improper for the police to show witnesses photographs of the person they will be asked to attempt to identify. The danger is that the photograph of the suspect will become so imprinted on the witnesses' minds that at any subsequent lineup, the image of the photograph will displace the witnesses' recollection of the offender. This danger is likely to arise because of a number of factors. First, the photographic identification would be much more recent than the original encounter between the witness and the suspect. This could cause the photograph to be imprinted more strongly in the mind of the witness. Second, witnesses would probably have a much longer period of time (not to mention better viewing conditions) to study and carefully look at the photograph than they did to study the actual features of the person they are trying to remember. This again is a psychological factor, which might result in a bias towards identifying on the basis of a previously shown photograph.

This danger might be present even if the witness fails to identify the suspect's photograph. At a later lineup, the witness might remember having seen the suspect somewhere before and conclude that it was at the scene of the crime.[253]

Case Law

The courts have clearly recognized the danger of showing a witness a photograph of the suspect prior to the conducting of a lineup. In *R.* v. *Goldhar and Smokler*,[254] in discussing the probative value of the identification evidence in such a case, the court noted, "there is always the risk that thereafter the person who has seen the photograph, will have stamped upon his memory the face he has seen in the photograph rather than the face he saw on the occasion of the crime".[255] The courts have been virtually unanimous in condemning the showing of photographs prior to a lineup.[256]

The reported cases, however, reveal differences of opinion as to the extent to which evidence that a witness saw the accused's photograph will detract from the value of the witness's testimony. While some of the

early cases go so far as to suggest that such a witness would no longer be "useful" to the prosecution,[257] most of the cases hold that the issue goes to the weight, rather than the admissibility, of the identification evidence. Thus, provided that the jury is instructed about the possibility that the witness, in identifying the accused, may be relying more upon a recollection of the photograph than upon a recollection of the offender, the appeal court will not generally interfere with a jury's verdict.[258]

A photographic display may be necessary to aid the police in selecting a suspect, and if both the photographic display and the subsequent lineup are properly conducted, a number of cases appear to hold that the evidence will be admissible, and a warning unnecessary.[259]

Yet in some cases, even though the photographic display was improperly conducted, it has been suggested that no warning need be given to the jury. For example, in *R.* v. *Ireland*,[260] even though only one or two photographs were displayed to the four witnesses prior to the lineup identification, Mr. J. Fair said that this evidence was admissible and that it could not be said "that the evidence of the witnesses was so seriously affected by the course taken by the police officer that the jury was bound to reject it as worthless."[261] Although some type of comment on the weight of this evidence was apparently made by the trial judge, Mr. J. Fair went on to say that "it is not necessary for the Judge in summing-up to say that the weight of evidence might be affected by that having been done."[262]

In one case the police invited a witness, before viewing a lineup, to look through a window at the accused, who was sitting alone. The English Court of Criminal Appeal condemned this objectionable practice in the strongest language:

> We need hardly say that we deprecate in the strongest manner any attempt to point out beforehand to a person coming for the purpose of seeing if he could identify another, the person to be identified, and we hope that instances of this being done are extremely rare. I desire to say that if we thought in any case that justice depended upon the independent identification of the person charged, and that the identification appeared to have been induced by some suggestion or other means, we should not hesitate to quash any conviction which followed. The police ought not, either directly or indirectly, to do anything which might prevent the identification from being absolutely independent, and they should be most scrupulous in seeing that it is so.[263]

Rule 503. Time of the Lineup

A lineup shall normally take place as soon as practicable after the arrest of a suspect; or before the actual arrest, if the suspect consents. Lineup arrangements (e.g., contacting viewers, obtaining distractors, arranging for a lawyer) shall be completed prior to the arrest whenever possible.

COMMENT

As a general rule, a lineup should be held as soon as possible after a crime has been committed and a suspect has been apprehended; the offender's image will be fresher in the witness's memory, and the police will be able to identify and release innocent suspects as soon as possible.

On the other hand, psychological studies have shown that the memory of faces does not deteriorate as rapidly as, for example, the memory of names or numbers. And, indeed, there appears to be little deterioration the first few days following perception. (See the comment following Rule 801.) Therefore, a suspect's rights and the fairness of the lineup procedure should never be sacrificed for the sake of speed and expediency. In particular, ample time should be taken to find similar distractors, and to permit suspects to notify their lawyer.

In some circumstances, it might be advisable deliberately to delay the holding of the lineup for one or two weeks. For example, if the witness has recently seen a photograph of the suspect, to avoid confusion between the memory of the photograph and the memory of the actual face, a delay might be in order. Similarly, if the witness accidentally comes into contact with the suspect before any formal identification proceedings, it may be advisable to postpone the lineup. Another situation where it might be advisable to delay the holding of a lineup is one in which the witness has been the victim of a crime of violence and is in a state of anxiety.

Because of these considerations, no precise time can be set within which a lineup must be held. The guideline simply states the general rule that it ought to be held as soon as is practicable; preferably, before the suspect is arrested.

Case Law

Canadian courts have not established any guidelines relating to the effect of time lapses upon the value of identification evidence. In *R.* v. *Louie*[264] the defendant appealed on the ground that the identification evidence was unreliable, since it was that of a sole witness who had picked the accused's photograph from an array eight months after the crime. However, the majority of the court were impressed that the witness made the identification without hesitation, and they upheld the conviction.[265]

In another Canadian case, *R.* v. *Peterkin*,[266] six months elapsed between the time of the robbery and the time of the witness's identification of the accused at the lineup. The accused's conviction was

quashed, but the court gave no indication that the time lapse was particularly crucial to the decision.

In Australia, in *Craig* v. *The King*[267] a judge of the High Court was critical of the police for not placing the accused in a lineup until five days before trial, although he had been in custody for ten weeks. However, these observations were made in dissent.

The courts of India have addressed themselves to this issue on a number of occasions. In one case, the court expressed doubts about the criminal's appearance being so impressed upon the witnesses' minds as "to enable them to correctly identify a stranger after the lapse of eight months."[268] In *Mohd. Kasim Razvi* v. *State*[269] it was said that an "identification after a great length of time cannot be judicially availed unless there is some convincing reason to accept that identification."[270] The lineup was held fifteen months after the commission of the offence in *Daryao Singh* v. *State*.[271] The court stated that the "value of identification evidence is very much minimized if the identification proceedings are held long after the occurrence."[272] However, in a case where there was a ten-month lapse, the conviction was upheld by a court which stated that "no hard and fast rule can be laid down with regard to the period of time which may elapse between the commission of the crime and the identification of the culprits."[273]

Present Practice

All police forces report that they hold lineups as soon as possible. In many cases, this might be as soon as seven to eight hours after the offence; in others, it might be one day later. Of course, if the suspect is not apprehended, it might not take place until months later.

Rule 504. Refusal to Participate

A suspect is under no obligation to participate in a lineup. However, if a suspect under arrest refuses to participate in a lineup, evidence of the refusal may be introduced at trial. A suspect who refuses to participate in a lineup shall be told of this consequence, and of the fact that a less safe method of identification such as a photographic display, informal viewing or confrontation may be substituted for the lineup.

COMMENT

Both innocent and guilty suspects may believe that participation in a lineup is against their interests. Innocent suspects may generally, or for some specific reason, distrust the fairness of a lineup. Guilty suspects

may believe that they will almost certainly be identified at a lineup and that it is, therefore, in their interest to force the police to arrange a less probative method of identification, such as a confrontation. They will then be able to argue at trial that doubt is cast on the eyewitness's evidence because of the means of identification employed.

This guideline provides that the police may not compel a suspect to participate in a lineup, but that comment may be made at trial on an accused's failure to participate. Rule 501(f) provides that, if a lineup cannot be held because the suspect refuses to cooperate, a less reliable method of identification, such as a photographic display, may be used.

Although the accused might be compelled to take part in other identification procedures such as fingerprinting,[274] there is little point in providing the police with the authority to compel an accused to participate in a lineup. The purpose of a lineup is to test the witness's ability to select the offender from a group of people, none of whom draws the particular notice of the witness. Obviously, if the police must use physical force to introduce the suspect into the group, the witness's attention will likely be focussed upon him or her. The lineup's purpose will thus be thwarted. Under these conditions, the "lineup" would have no advantage over a confrontation. Indeed, it would be much more prejudicial to the accused than a confrontation, since the inference drawn by most people observing the struggling suspect, would be that he or she must have something to hide.

A procedure could be provided whereby if an accused refused to cooperate in the conduct of a lineup, the police could obtain a court order compelling participation,[275] or charge him or her with obstruction of justice. Conduct on the part of the accused that tends to attract attention to himself or herself in the lineup might then be punishable as being in contempt of a court order, or as resulting in the obstruction of justice. However, this procedure seems unduly cumbersome; furthermore, incarceration for contempt for refusal to participate in a lineup seems unduly harsh. If the accused refuses to participate in a lineup, a photographic display, which is almost as reliable as a lineup, could be held in most cases.

Partly to encourage an arrested suspect to participate in a lineup, the guideline provides that a refusal to participate in a lineup can be commented on at trial.[276] In some cases, the accused's refusal to participate in a lineup might be evidence of guilt. In some cases, what makes the evidence particularly probative is the fact that, if the police do not conduct a lineup, the jury might infer that a less reliable method of identification was used because the police were unsure as to whether or not they could obtain a positive identification by using a lineup.

On the basis of this last argument, it has been suggested that evidence of the accused's failure to appear in a lineup should only be admissible in those cases in which it is necessary for the Crown to explain the failure to hold a lineup, for example, where the accused raises the issue.[277] However, it is difficult to imagine a case in which the accused refused to participate in a lineup and where it would not be necessary for the Crown to explain this fact. Even when the defence does not challenge the validity of the identification procedure adopted, there is always a strong possibility that the jury will, on its own initiative, question the value of the identification evidence in light of the manner in which the accused was first presented to the witness for identification. Furthermore, in most cases, if a confrontation or dock identification were used, the trial judge would be required to caution the jury about the dangers inherent in these methods of identification.

An innocent accused may of course have a number of reasons for not participating in a lineup; for example, a fear that the lineup will be unfairly conducted. Any such explanation will be admissible at trial and subject to consideration by the jury. The trial judge should, in such cases, caution the jury that before they draw an adverse inference from the accused's refusal, they should carefully consider the explanation given for the refusal, or indeed other possible explanations, and bear in mind that innocent people might be understandably apprehensive about taking part in a police lineup.

It might be objected that the threat of a comment on the accused's failure to participate in a lineup will coerce some accused persons to take part in a lineup against their will, and that this is an infringement of the accused's privilege against self-incrimination. However, a review of the values underlying the privilege reveals that none are threatened by this form of compulsion on the accused to participate in a lineup.[278] First, one value underlying the privilege is that it serves to protect anxious but innocent suspects from having to take the witness stand and give testimony that might convey a misleading impression of guilt. This danger does not arise when a person is simply asked to appear in a lineup. Second, the privilege operates to deny the police access to what is often unreliable evidence (a suspect's confession) and thus, forces them to search for more reliable evidence. A lineup is the most reliable type of identification evidence, and therefore it would be incongruous to deny its availability to the police for this reason. Third, the privilege deprives the State of a power that can be easily abused in suppressing dissent. Requiring a suspect to appear in a lineup is not a police power that can be used to control freedom of thought and political dissent. Fourth, the privilege ensures that all persons are treated in a manner consistent with prevalent notions of human dignity. Compelling a person to incriminate himself or herself or to lie to protect personal interests is widely seen as an invasion of personal dignity. However, commenting on a suspect's

failure to attend a lineup is not widely regarded as unduly infringing upon a person's privacy or dignity. To the extent that commenting on an accused's failure to participate in a lineup can be said to affect any of the interests underlying the privilege against self-incrimination, the danger raised is outweighed by the probative value and necessity of a lineup identification.

It must be acknowledged that one objection to permitting a comment to be made on the accused's failure to participate in a lineup is that the accused may sometimes be faced with the choice of taking the witness stand to give an explanation for not appearing in the lineup, or take the risk that the jury will improperly infer consciousness of guilt from his or her refusal. However, this choice often confronts accused persons who have exclusive personal knowledge that must be led in defence in order to prove their innocence.

Case Law

Generally, the courts have held that placing a suspect in a lineup falls within the usual power of the police when engaged in criminal investigations.[279] Both American[280] and Canadian authorities have held that participation in a lineup is beyond the protection of the privilege against self-incrimination. Basically, the privilege has been interpreted to cover only testimonial proof.[281] As Mr. Justice Dickson stated in the leading case of *Marcoux and Solomon* v. *The Queen*:

> An accused cannot be forced to disclose any knowledge he may have about an alleged offence and thereby supply proof against himself but (i) *bodily conditions*, such as features exhibited in a courtroom or in a police lineup, clothing, fingerprints, photographs, measurements ... and (ii) *conduct* which the accused cannot control such as compulsion to submit to a search of his clothing for concealed articles or his person for bodily markings or taking shoe impressions or compulsion to appear in Court do not violate the principle.[282]

In *Marcoux and Solomon* the Supreme Court held that in the circumstances of that case, evidence that the accused refused to participate in the lineup was admissible. However, as an aside, the court said that normally such evidence should only be admissible if, as the evidence unfolds, it becomes necessary for the Crown to explain why it did not hold a lineup.[283]

Present Practice

The percentage of cases in which accused persons refuse to participate in lineups varies from city to city. This probably reflects the importance various police forces attach to holding lineups, or the degree of compulsion they place on suspects to participate. In Ontario, the

police reported that suspects often refuse to participate in lineups. In Québec, on the other hand, the police report that this rarely occurs. In other Canadian cities, the approximate percentages of cases in which accused persons refuse to participate in lineups are as follows: Victoria, 25 per cent; Calgary, 5 per cent; Edmonton, 15 per cent; Vancouver, 10 per cent; Regina, 20 per cent; Fredericton, 10 per cent; Halifax, 20 per cent; Saint John, rarely; St. John's, 50 per cent.

If the suspect refuses to participate in a lineup, police in most cities report that they attempt to conduct an informal identification procedure, without the suspect's knowledge. Common techniques include having the witness hide behind a door with a window, in a hallway from which a procession of people including the suspect can be observed, or placing the suspect in a crowded holding cell or courtroom. Police in some cities use a photographic display. However, police in a large number of cities simply resort to a confrontation when the suspect refuses to participate in a lineup.

About one-half of the cities report that if suspects refuse to participate in a lineup, they are warned that their refusal may be admissible in evidence at trial, and may be taken as evidence of guilt.

Rule 505. Lineup Procedure

GENERAL COMMENT

As explained in the general comment on lineups, a properly-conducted lineup can be invaluable to the prevention of wrongful convictions. An improperly-conducted lineup, however, may be far more damaging to a mistakenly identified accused than even a confrontation. The lineup may be viewed by the jury as a scientific test for determining the identity of an offender. They may not appreciate the subtle biases that may be introduced into the lineup procedure. Indeed, it may be impossible for the defence to reveal the biases of an improperly-conducted lineup. Therefore, since a lineup biased in any manner cannot be cured by a subsequent procedure, and since the jury may not appreciate the full significance of the bias, it is crucial that the lineup be properly conducted in the first instance. Thus, although the guidelines that follow may appear rather elaborate, there would appear to be no reason why every detail of the lineup should not conform to the best practice available. Furthermore, conducting as fair a lineup as possible will generally require very little more time or effort than conducting a haphazard one. And it will ensure that the prosecution's evidence of identification at trial is as probative as possible. Furthermore, the guidelines are just that —

guidelines. None of them prescribe hard and fast rules; they are designed to guide the police in conducting fair and reliable lineups.

(1) *Number of Distractors.* All lineups, except blank lineups, shall normally consist of at least six persons (referred to in these guidelines as "distractors"), in addition to the suspect.

COMMENT

There are two competing interests that must be reconciled in determining the number of distractors that ought to be required in a lineup. On the one hand, a lineup consisting of too few participants will prejudice the accused in two ways. First, any distinctive features of the accused will be magnified in a small group. Every person has certain peculiar features, and thus, as the number of participants decreases, the prominence of those features possessed by the suspect will tend to increase. Second, smaller lineups increase the probability that the accused will be selected by the witness who is inclined to guess. For example, if there are eight participants in a lineup, given a witness who does in fact make a choice, the suspect has one chance in eight of being chosen simply by chance.[284]

On the other hand, as the number of participants increases, the witness's recognition accuracy will decrease because of the interfering effect of similar distractors.[285] Finally, the most important factor imposing a constraint on the number of participants is the likelihood and convenience of assembling distractors similar in appearance to the suspect. Setting the number too high would place an intolerable burden upon the police officers charged with assembling lineups.

The guideline requires that the lineup normally consist of at least seven persons. This figure represents a rough trade-off between the interests mentioned above.[286] It is clearly arbitrary in the sense that it would be hard to prove with any degree of confidence that the trade-off would be better balanced at the figure of four or twelve. However, it does represent what experience in Canada and other jurisdictions has shown to be an acceptable number. The present regulations of the major Canadian police departments provide for minimum numbers, in addition to the accused, ranging from four to ten. Based upon our survey of present police practices, it would appear that most cities use five or six distractors; however, a few cities routinely use eight or nine. In England, slightly more distractors are normally used than in Canada. The *Home Office Circular on Identification Parades* suggests that lineups should consist of the suspect plus "at least eight or, if practicable, more [persons]."[287] By contrast, in the United States the number of distractors

used in lineups tends to be somewhat lower than that normally used in Canada. Most American commentators have suggested that lineups should consist of four to six participants.[288]

Case Law

There are no reported Commonwealth cases in which the defence has argued that the lineup from which the accused was selected contained an insufficient number of participants. (There are, of course, cases in which the defence complained of an absence of similarity between the accused and the stand-ins.) One of the smallest lineups reported in the Canadian cases consisted of the accused and four others.[289] One of the largest consisted of the accused and eleven others.[290] Judging from the reported cases, the average lineup size in Canada appears to be five or six.

In India, the courts have displayed far greater concern about the size of lineups than in other common-law countries. It has been stated in a number of cases that the accused should stand beside no less than nine or ten others.[291] However, in one case it was conceded that, if too large a number of persons were mixed with the suspect, "there might be a danger of putting too much strain on a witness's ability to pick out a suspect."[292]

(2) *Persons Disqualified as Distractors.* **Normally, no more than two persons from a group of persons whose appearance and mannerisms are unduly homogeneous shall act as distractors in a lineup, unless the suspect is a member of this group of persons. Normally, police officers shall not act as distractors.**

COMMENT

It is often convenient to select lineup participants from an institution where persons similar in appearance to the suspect might be found, such as armed forces camps, hospitals and police stations. The danger in this practice is that the distractors might have an identifiable standard appearance. For example, police officers or armed forces personnel tend to be identifiable, particularly if they appear as a group, because of their bearing and mannerisms. Using a group of people from an institution to act as distractors also raises the danger that all distractors will know each other and be unduly conscious of the stranger in their midst. Thus, the police are encouraged to obtain distractors from a variety of places.

The use of police officers gives rise to additional concerns. Even officers who are not involved in the investigation of the particular case may believe that they and their colleagues share a community of interest

in the apprehension of criminals. Thus, they may overtly or subconsciously assist the witness in identifying the suspect. Finally, it is important that lineups not only be fairly conducted, but also that they be free from any taint of potential unfairness. Even when police officers who appear in lineups conduct themselves with exemplary fairness, the appearance of justice may be lacking. People might be left with a lingering sense of bias.

People being held in local jails and nearby detention centres often provide a readily-accessible pool of lineup distractors, but they may be inappropriate for two reasons. First, they may be unkempt, even if held for only a few days, and unless the suspect is similar in grooming, he or she will stand out in contrast to the other participants. Second, people who are in custody may be tempted to disrupt the orderly and effective conduct of the lineup out of feelings of empathy with the suspect. Since this danger can be guarded against in individual cases, the guideline does not provide any general prohibition against using these people.

Case Law

In the only Commonwealth case in which most of the distractors in the lineup were police officers, the court spoke disapprovingly of the practice.[293] However, since in this particular case an adequate direction had been given to the jury as to the weight and force to be attached to the identification evidence, the court was satisfied that there had been no miscarriage of justice.

Present Practices

Most police forces normally find distractors off the street. Universities, arcades, bars, and restaurants are convenient sources of distractors. In some cities, a description of the suspect is sent over the police radio, and officers on the beat are asked to search for suitable distractors. In other cities, it appears that police officers are sent out specifically to find distractors.

In most cities, police officers are seldom used as distractors. However, two police departments appear to use them routinely, while two others use them frequently. In a large number of cities, people in custody are routinely used as lineup distractors.

In most cities, police search for distractors immediately prior to holding the lineup. In other cities, for example Guelph, the police will often schedule the lineup, and distractors will be invited to appear at the scheduled time. This might be a day or two after they were first notified.

The task of assembling distractors normally appears to take one-half to three hours.

(3) *No More than One Suspect.* **No more than one suspect shall normally appear in a single lineup.**

COMMENT

If there is more than one offender and the police have several suspects, it might be convenient to place them all in a single lineup. However, there are a number of reasons why this is not a good practice. First, one of the reasons for requiring a lineup composed of seven participants is to reduce the chance that the witness will simply correctly pick the suspect by guessing. Obviously, if more than one suspect is placed in a lineup, the likelihood that the witness will guess at least one of them correctly increases in proportion to the number of suspects in the lineup. In such a case, the value of the lineup as a test of the witness's ability to identify the persons he or she saw is diminished.

A second reason for requiring that only one suspect appear in each lineup is that unless the suspects bear a striking similarity to one another, there is little likelihood that a lineup will be assembled in which all the participants are sufficiently similar to prevent the suspects from standing out.

Finally, if the suspects are similar in appearance (for example, if they are brothers), their relationship to one another may be manifest by their physical appearance, demeanour or physical bearing towards one another. Consequently, if the eyewitness knows, for example, that the suspects are related, the eyewitness might select the suspects because they are so similar to one another.

Most jurisdictions are very strict about not allowing more than one suspect to appear in a lineup.[294] In England, the Home Office rules provide that where there are two suspects of "roughly similar appearance", they may be paraded with at least twelve others, but where two suspects are not similar in appearance, or there are more than two suspects, separate parades should be held, using different persons in each parade.[295] The rules also provide that where the suspects are members of a group, for example, where police are involved, the identification parade should include not more than two of the possible suspects, and even then only if they are of similar appearance.[296]

Present Practice

Police in most cities report that separate lineups would not normally be held if there were more than one suspect, but that the number of distractors in the lineup would be increased. However, if the suspects were obviously dissimilar to one another, for example, where one suspect was white and one black, two lineups would be held. A few cities report that the same lineup would be used and the number of participants would not be increased. Others, for example, Edmonton, Fredericton, and Sherbrooke, report that a separate lineup is held for each suspect and the distractors match the physical characteristics of each suspect.

Case Law

In Canada, the practice of placing more than one suspect in a lineup has escaped criticism from the courts. In cases involving three suspects in lineups composed of seven[297] and ten participants,[298] the courts have failed to comment adversely. In one case, five suspects were placed together in a lineup and no adverse comment was made; however, the reported decision does not disclose how many distractors were used.[299]

In India, where it is common to hold lineups containing as many as ten suspects, the courts have acknowledged that the proportion of non-suspects to suspects may, in such cases, be reduced from the normal ratio of nine or ten to one. However, in one case where the ratio was permitted to drop below three to one, the court stated that the "identifications have little value because there is an appreciable risk of persons being implicated purely by chance."[300]

It is clear that if separate lineups are held, an entirely different group of stand-ins must be used with respect to each suspect. In a South African case this was not done. Two men were charged with theft. One of the accused was placed in a lineup with eight others. He was identified by one of the two witnesses. Shortly thereafter, the other accused was added to the lineup, which was otherwise composed of the same people. He was identified by both of the witnesses. The Supreme Court of South Africa referred to the identification parade as "entirely useless" and set aside the conviction.[301]

(4) ***Physical Similarity.*** **The significant physical characteristics of all persons placed in a lineup shall be approximately the same. In determining the significant physical characteristics of the suspect, regard shall be had to the description of the offender given to the police by the witness.**

COMMENT

If a witness were able to give a complete, detailed and accurate description of the offender, there would be little point in holding a lineup. The offender could be identified on the basis of the witness's description alone. However, witnesses are often unable to articulate many physical characteristics of the person they saw and are unable to recall other characteristics, even though they might recognize them. The purpose of the lineup is to present the witness with a number of persons similar in appearance to the offender as described by the witness, and then to have the witness choose the person with the unarticulated or forgotten characteristics of the person seen. Consequently, it is important that all lineup participants appear similar. If only one lineup participant has the physical characteristics the witness described, the witness might identify that person because it will be obvious that the person is the police suspect. In effect, the lineup would raise all the dangers of a confrontation.

Thus, a lineup of similarly-appearing persons serves two functions. First, it obscures the person whom the police suspect. Second, by presenting a number of persons who fit the general description of the offender, it compels the witness to be cautious in making an identification.

Lineup participants clearly cannot be similar in all respects. Physical characteristics such as apparent age, height, weight, hair length, skin colour, and build should be considered. General traits such as attractiveness and facial expression are also important.[302] In determining which characteristics of the lineup participants should be similar, the police should view the suspect and attempt to match obvious characteristics. However, the witness's description of the suspect should also be used to discover what characteristics the witness felt were salient.[303]

Still, it will only be possible to assemble a range of people approximating the suspect in appearance. Thus, if the suspect weighs 150 pounds, a group of people ranging in weight from approximately 140 to 160 pounds will necessarily have to be included in the lineup. However, the suspect's features should always fall close to the median of any such range of features represented in the lineup.

If a lineup is fair (in the sense of serving the purposes mentioned above), then a person who knows only the general description of the offender should not be able to pick him or her out of the lineup. In a number of actual cases, psychologists have given testimony about the fairness of a lineup. For example, in an Ontario case, *R.* v. *Shatsford* (unreported) the witness described the offender as being rather good-

looking. Even though the witness was unable to give many further details about the offender's appearance, she picked the accused out of a lineup. Simplifying the experiment that formed the basis of their testimony, the psychologists showed a photograph of the lineup to a large number of people and asked them to pick out the guilty person. The subjects were told: "Imagine that you are a witness to a crime. All you can remember about the criminal is that he was rather good-looking. The police then arrest someone whom they think committed the crime, and they place him in a lineup. Imagine that you are shown this lineup and asked by the police to identify the guilty person. The police seem certain that they have the right person, but they need your identification. You try your best to pick out the guilty man. In the picture below, whom would you pick?" If the lineup were a fair one, based on this general description, people should only have been able to pick the suspect by chance. Twenty-one subjects were shown the photograph; by chance, fewer than two should have been able to pick the apparent suspect. In this particular case, eleven out of the twenty-one subjects picked the suspect.[304]

While studies such as this can only provide a rough measure of the fairness of a lineup, they do emphasize the need for lineup participants to be of similar appearance, if the lineup is to achieve its purpose.

All jurisdictions require that lineup participants be of similar appearance. It is interesting to note that in some countries, this includes the express requirement that they be members of the same social class. For example, the *Mexican Code of Penal Procedure* provides that "[t]he individuals who accompany the person being identified must be of a similar class, taking into account his education, breeding and special circumstances."[305] In England, as well as providing that the suspect should be placed among persons "who are as far as possible of the same age, height, general appearance ... and position in life as the suspect".[306]

Case Law

The courts insist that lineup participants be similar in appearance.[307] However, it is not clear exactly how similar the participants must be, nor what the consequences of holding an unfair lineup are.[308]

Even when the lineup has been conducted unfairly, in that the participants have not been of similar appearance, the courts have been reluctant to set aside a conviction on the basis of such evidence. For example, in *R.* v. *Armstrong*,[309] a conviction was not set aside even though the accused, who was an Oriental, was placed in a line consisting of five others, all of whom were Occidentals. And in *R.* v. *Jones*[310] the accused, who was Indian, was placed in a lineup composed of people who bore no resemblance to him in age or appearance, except for a man who

was part Indian. In dismissing the accused's appeal, the Ontario Court of Appeal noted that "it would be very apparent to the jury that the line-up evidence was, at best, very weak and no instruction from the trial Judge would be required to enable them to reach this conclusion."[311]

The opposite conclusion was reached by the English Court of Criminal Appeal in an earlier case. The two accused persons were dishevelled and unshaven, unlike the other lineup participants. Despite an impeccable direction from the trial judge, the jury convicted the accused. The appeal court considered it unsafe to allow the verdicts to stand, and quashed the convictions.[312]

(5) *Distinctive Features.* **If the suspect has any distinguishing marks or features, they shall be obscured in some way. For example, they may be covered and the corresponding locations on the distractors' bodies similarly covered. Or, all lineup participants may be made up so that they reveal features or marks similar to those revealed by the suspect.**

COMMENT

If the suspect has a prominent distinguishing feature, such as only one arm, a lineup is of little value. The suspect would be so easy to distinguish from the other participants that the lineup would, in effect, simply amount to a confrontation. The need to disguise the distinguishing features of a suspect is particularly urgent, since witnesses who view a person with an unusual characteristic might remember this feature of the person but very little else. Thus, there is a danger that they will subsequently identify someone as the offender simply because they possess this characteristic.[313]

A reported case that illustrates this potential danger involved ten eyewitnesses, all of whom had described the offender as having a scar over his ear. They all picked out the only member of the lineup with such a scar. He was acquitted at trial when he was able to prove that, at the relevant time, he was over one thousand miles from the scene of the crime.[314]

In some cases, it might be possible to obscure the suspect's distinguishing feature by making it appear that all the lineup participants had similar features. Since the witness will be able to view the suspect in the same condition as he or she was when first observed (if the suspect is the offender), the witness would, to some extent, still be able to use the distinguishing feature as a cue in making an identification.

In many cases, however, disguising all the distractors to resemble the suspect in some distinguishing manner will be inconvenient or impossible. In these cases, it may still be possible to obscure the distinguishing mark simply by covering it. In order not to attract attention to the suspect, all distractors would obviously have to be similarly covered. Even though the witness will thus be presented with an array of persons of unnatural appearances, and will be denied access to the most likely means he or she would use to identify the suspect, the information gained in knowing whether the witness was, nevertheless, able to identify the suspect could be of substantial value.

Although the need to conceal distinctive marks may be most compelling where the witness mentioned them in describing the offender, it should be done in all cases. The witness may, for example, have observed and subconsciously registered the fact that the offender bore a particular mark. When faced with a lineup of people, only one of whom bears such a mark, the witness's subconscious memory may be triggered. An identification may result from the witness's implicit, but perhaps erroneous judgment that any person bearing such a mark is likely to be the criminal.

There is an additional concern in cases where the witness has not included the suspect's distinguishing features in the description given to the police. In the case where the witness described the feature to the police, there is some independent evidence linking the accused with the offender. But where such a mark is not mentioned by the witness prior to viewing the suspect, no such independent evidence exists.

In addition to the argument mentioned above for disguising distinguishing features even where the witnesses have not mentioned them in their descriptions, there is also the concern that the distinctive mark may lead to an identification for reasons totally unrelated to a resemblance between the suspect and the witness's image — conscious or unconscious — of the offender. For example, the witness may notice a scar, tattoo or unattractive feature possessed by the suspect alone, and conclude that he or she is probably the offender because the witness associates unattractiveness or tattoos with criminality, or scars with violent tendencies.

In some cases, due to the unusual appearance of the suspect, it will be necessary to forego a lineup altogether. Rule 501(b) provides for some form of identification test to be used in these circumstances.

Case Law

There are reported instances of lineups in which the police have attempted to conceal distinguishing features of the suspect. For example,

it is reported that in an old English case in which the suspect had a club foot, the feet of all members of the lineup were covered by rugs.[315] However, there are no English or Canadian cases in which the courts have criticized the police for failing to disguise the suspect's distinguishing characteristics, even though in a number of cases the suspect clearly had distinguishing marks.[316]

In India, magistrates who conduct lineups are instructed by a provision of the *Manual of Government Orders* as follows:

> If any of the suspects is possessed of a scar, a mole, a pierced nose, pierced ears, a blinded eye, a split lip or any other distinctive mark efforts should be made to conceal it by pasting slips of paper of suitable size over it, similar slips being pasted at corresponding places on the faces of a number of other under-trials [stand-ins] standing in different places in the parade.[317]

Failure to comply with this provision has resulted in acquittal. In *Babu* v. *State*, [318] the accused was the only lineup member with a large scar on his neck. The court stated:

> It is the duty of the magistrate to satisfy himself and not for the accused to point out to him how his duty is to be performed. It seems to me that this failure on the part of the magistrate holding identification proceedings to take steps to cover the scar on the neck of [the accused] ... is sufficient to discredit the identification evidence. Babu must get the benefit of the doubt and be acquitted.[319]

In *Asharfi* v. *State*[320] it was pointed out that the rule was not only observed but was sometimes followed so literally that so many slips of papers are pasted on the lineup members that they look "like a scarecrow and what the witnesses are called upon to identify is not a human face but a mask."[321]

Present Practice

The police in virtually all Canadian cities report that they make no effort to disguise distinguishing characteristics of the suspect, such as scars and tattoos. Generally, they report that those are often the very characteristics the witness looks for in identifying the suspect. Some cities report that if the suspect was wearing glasses, for example, they might attempt to have all lineup participants wear glasses, and indeed some police forces have a stock of glass frames that they use for this purpose.

(6) *Clothing*. Lineup participants shall be similarly dressed. Thus, ordinarily, either all or none of the lineup participants shall wear eyeglasses or items of clothing such as hats, scarves, ties, or jackets. Subject to Rule 505(12), the suspect shall not wear the clothes he or she is alleged to have worn at the time of the crime, unless they are not distinctive.

COMMENT

A witness's attention may be drawn towards the lineup participant whose clothing is noticeably different from that of the others; hence the necessity that the participants' clothing be as similar as possible. A suspect dressed in jeans and a T-shirt would undoubtedly attract the critical attention of the witness if other distractors wore suits. Although it is impractical for the lineup participants to wear identical clothing, it should be possible to find distractors who are dressed in a fashion roughly similar to the suspect, or to instruct them to dress in such a fashion. If the suspect does not own clothes that are similar to those worn by the other participants, the police should see that they are provided. The clothes must fit the accused properly, and not be conspicuous in comparison with those worn by others.

One method of achieving uniformity in dress would be for the police to issue each participant with special standardized clothing. However, it is questionable whether absolute uniformity of dress is necessary at lineups. A number of obvious practical problems would also attach to such a requirement. First, many of the lineup participants would resent being required to don a uniform. This might exacerbate the problems already facing the authorities responsible for assembling a lineup. Second, because of variations in human size, virtually the only uniform clothing that would be appropriate for this purpose are coveralls, which might inhibit the witness's recognition of a person previously seen in closer fitting street clothing. Finally, the costs of such a proposal might be large, particularly to the police departments in smaller communities.

Normally, the suspect should not wear the same clothes as it is alleged that the offender wore at the time of the crime. The reason for this is that the witness might identify the suspect simply on the basis of the clothing worn. This would defeat the purpose of the lineup, which is to see whether the witness can identify the suspect on the basis of physical appearance and characteristics.

If the suspect is wearing clothes at the time of the lineup that are similar to the clothes allegedly worn by the offender, it would be better police practice to have the suspect remove these clothes and don others. Then the witness could identify the clothes that the offender was alleged to have worn, and separately attempt to identify the suspect on the basis of physical appearance. In this way the police can obtain, in effect, two items of identification evidence. If the police do not have a set of street clothes for the suspect to wear in this situation, all lineup participants might be requested to wear coveralls.

In some cases, it might be important to the identification of the offender that an item of clothing worn at the time of the offence be worn by the lineup participants. This situation is dealt with in Rule 505(12).

Interestingly, some countries require the suspect to be dressed as he or she was when seen by the witness. For example, the Italian *Code of Penal Procedure* dictates that a suspect is to be "presented in the same condition in which he could have been seen by the person summoned."[322] On the other hand, a provision in the Mexican *Code of Criminal Procedure* requires that lineup participants wear similar clothing.[323]

Case Law

In many reported cases, it seems highly probable that the witness was greatly aided in identifying the accused by the fact that the accused was wearing either the same clothes or clothes similar to those said to have been worn by the offender. Yet rarely have the courts commmented adversely upon this practice.[324] In particularly flagrant cases, however, the courts have criticized the police practice of placing the suspect in a lineup, wearing clothes similar to those allegedly worn by the offender, and in some cases, have quashed a conviction.[325]

In some cases, it is clear that the police have recognized that the case against the accused would be strengthened if the witness identified the accused and his or her clothing separately. In *Sommer* v. *The Queen*,[326] the witness separately identified the hat and coat of the appellant. Unfortunately, the police then had the accused wear the clothing in the lineup. The lineup evidence was ruled inadmissible.

In *R.* v. *Smith*[327] the police properly had the witness identify the appellant and his windbreaker jacket separately. This proved useful in evaluating the evidence, since the witness was forced to admit: "I cannot identify the right man like because he did not wear a jacket, if he wear a jacket I could identify him."[328] The conviction in this case was quashed because the identification evidence was too tenuous to support a conviction.

Present Practice

Police in virtually all cities report that, in most cases, the accused would wear the same clothes that he or she wore when arrested, which in some cases would be similar to the clothes that the witness described the offender as wearing. However, if the suspect's clothes are very distinctive, police in some cities will attempt to have the suspect appear in other clothes. Some police forces will go to the suspect's home to obtain other clothes; others will get a change of clothes from organiza-

tions such as the Salvation Army, and yet others will dress all the lineup participants in overalls or smocks.

All police forces report that they attempt to achieve uniformity with respect to articles such as ties and suit jackets.

No police force cautions suspects that they can change their clothing if they wish, but normally the suspects will be permitted to, if they request it. In a few cities, the suspects are invited to exchange jackets with other lineup participants.

(7) *Identity of Suspect.* If possible, the distractors shall not be aware of the identity of the suspect.

COMMENT

The psychological data suggesting that police officers might unknowingly transmit their knowledge of who the suspect is, to the eyewitness, would also tend to suggest that distractors with the same knowledge could transmit similar cues. The methods by which this would be done might differ, but the end result would be the same. Whereas officers might direct their attention to the accused by changing their tone of voice or facial expression when referring to a certain person, the distractors might identify the suspect by unconsciously staring or taking side-glances at the person they know "should be picked", inadvertently pointing their bodies in his or her direction, or by moving away from the suspect, perhaps because they feel nervous being near him or her.

Although in some cases there might be practical difficulties in guarding the anonymity of the suspect, normally these should not be too difficult to overcome. It will simply require treating the suspect as any other distractor. Of course, if the suspect insists on changing positions in the lineup after one witness has viewed the lineup, his or her identity will become known. This could be avoided by making the changing of positions automatic and mandatory, involving all the members of the lineup, not just the suspect. Also, if suspects wish to voice objections concerning the composition of the lineup, it would be extremely difficult to have them do so without the distractors becoming aware of their identity.

Present Practice

It would appear that under present practices, distractors usually know who the suspect in the lineup is. No special effort is made to conceal his or her identity in most cities. However, some police forces

report that, in some cases, distractors would not know who the suspect is. In at least one city, distractors are interviewed separately, so that they will not know the identity of the suspect.

(8) ***Positioning of Suspect.*** **Suspects shall be permitted to choose their initial position in the lineup and change their position after each viewing. They shall be informed of these rights.**

COMMENT

The right of a suspect to determine where to stand in the lineup is important for two reasons. First, a witness who has viewed the lineup and who, in spite of the precautions taken, is able to communicate with another witness who has not yet viewed the lineup, might remark on the position of the suspect. A suspect is protected against this danger by changing positions after each viewing. Second, the suspect who is accorded this right will be more inclined to view the lineup as a fair proceeding. All possible steps should be taken to remove any suspicion that witnesses have been told in advance whom they are to identify. A suspect may also believe, rightly or wrongly, that there are particular strategic locations in a lineup more likely than others to attract the witness's attention. The suspect might think, for example, that the middle and end positions would be particularly eye-catching. Suspects will invariably feel that the lineup has been fairer if they are able to choose a position they feel is innocuous. As well as making the proceedings more acceptable, allowing suspects to choose their position in the lineup might put them more at ease, and hence make them less conspicuous.

Many jurisdictions specifically provide in legislation that suspects may choose their position in the lineup.[329]

Case Law

No reported case discusses the right of suspects to choose their lineup position. However, in *Nepton* v. *The Queen*,[330] the court commented adversely on the fact that the accused "was placed in the centre with two other persons on each side."[331]

Present Practice

The police in virtually all cities surveyed permitted suspects to choose their position in the lineup. In most cities, suspects are also invited to change their position if there is more than one witness, and apparently they frequently do so.

(9) *Uniform Conduct of Participants.* **The distractors shall be instructed to conduct themselves so as not to single out the actual suspect. In particular, they shall be told to look straight ahead, to maintain a demeanour befitting the seriousness of the proceedings, and not to speak or move except at the request of the supervising officer.**

COMMENT

If it is necessary for the distractors to know the identity of the suspect, steps should nonetheless be taken to minimize the likelihood that their behaviour will bias the witness towards selecting the suspect. Thus, all lineup participants should be instructed to look straight ahead and not to talk. They should also be instructed not to convey any hints or suggestions as to who among them is suspected by the police, and not to behave in a manner that would attract the witness's attention. Most importantly, they should be cautioned about the seriousness of the proceeding and should be told not to assume an air of levity or an appearance of calm or relaxation inappropriate to the occasion. If they can be impressed with the seriousness of the occasion, it is more likely that they will assume a demeanour similar to that of the suspect.

(10) *Suspect's Objections.* **Before the entry of the witness, the suspect or his or her counsel shall be asked whether he or she has any objections to the lineup. If objections are voiced, they shall be considered by the supervising officer and recorded.**

COMMENT

This guideline has been drawn up so that any unfairness or irregularity overlooked by the supervising officer can be corrected before the entry of the witness.[332] If a faulty procedure takes place, it could result in evidence that is unreliable and prejudicial to the accused, or at the very least, a waste of time and effort.

It is also important that the suspect be given an opportunity to object to the arrangements before the actual viewing, in order to assist the court later in determining whether the lineup was conducted fairly. On the one hand, if the suspect makes no objection, this would strengthen the credibility of the procedure and lessen the possibility that its fairness might be impugned at trial. Presumably, a suspect who objected at trial would be asked why he or she did not object at the lineup, when there might have been some opportunity to correct the procedures. On the other hand, if an objection with full particulars was lodged at the time of the lineup, that information would be available to the court to aid it in deciding what weight to give to the identification evidence.

(11) ***Photograph of Lineup.*** **A colour photograph or videotape shall be taken of all lineups before or while being observed by the witnesses. If the accused changes position in the lineup after it has been viewed by one witness, or if the composition of the lineup is in some way changed, another photograph shall be taken before a subsequent witness views the lineup.**

COMMENT

To assess the value of a witness's identification evidence, the court must determine whether the suspect was identified at a fairly-conducted lineup. The fairness of the lineup will depend, in part, upon the similarity of the lineup participants. A written description of the physical appearance of each of the lineup participants can provide the court with only a rough idea of whether the distractors were similar in appearance to the suspect. However, photographs should enable the trier of fact to make an informed judgment as to whether there was any possible sources of bias in the lineup caused by the dissimilarity of the participants. Indeed, bias could be tested with the aid of a photograph, by giving uninvolved people a general description of the suspect, and by asking them to pick the suspect from the photograph.[333]

If the authorities are required to photograph lineups, they may be more diligent in assembling participants bearing a close resemblance to the suspect. This will be due to a concern that they might be criticized at trial if they fail to do so, and because the photographs will be reviewable by their supervisors, even if they are not produced at trial.

In exceptional situations, a photograph taken of a lineup containing a suspect may be used for subsequent identification purposes. For example, if a suspect is identified by one witness at a lineup and then refuses to participate in another, a photograph of the lineup may be shown to the other witnesses.

It has been suggested that it would be costly and inconvenient to require police in smaller communities to photograph lineups, and that such a practice would make it more difficult to obtain volunteer distractors — they would object to being photographed because someone might wrongly conclude that they had been in trouble. Some people might also be concerned about the possible misuse of the photographs. In these cases, the volunteer's fears can be allayed by explaining the reason for the photograph, and by assuring him or her that the photographs are kept secure and are eventually destroyed. In any event, the experience of those police departments that routinely photograph lineups does not appear to substantiate these apprehensions.

The guideline provides that where more than one witness views the same lineup, separate photographs should be taken. This may be

important since the suspect may have changed positions, or other participants may have in some way changed their appearance between viewings.

Naturally, if the police department has videotape equipment, a video of the lineup is preferable to a photograph.

Case Law

There are no cases in which the court has held that the police must take photographs of lineups. However, in a number of cases where such photographs have been introduced into evidence, the courts have noted their usefulness.[334]

Present Practice

Photographs of lineups are taken in all cities surveyed except Hamilton, Toronto, Trois-Rivières, and Saint John. These cities reported that the major reason photographs are not taken is that it would be too difficult to obtain volunteers for the lineup. However, police in Vancouver, Edmonton, St. John's and Calgary report that objections to a photograph are rarely made by lineup participants. Other cities report that members of the public never object to having their photographs taken. The police in all cities except Ottawa report that if the accused changes position in the lineup, another photograph is taken. Except for Ottawa, Sherbrooke, and Montréal, the police in all cities that took photographs took them in colour.

Colour photographs, although perhaps not significant in most cases, might be crucial where the suspect's skin pigmentation or hair colour, for example, is different from that of the other lineup participants in a way that would not be discernible in a black and white photograph.

A photograph only captures an image of the lineup at one instant in time. During the course of the proceedings, distractors or even the suspect may behave in a manner that would provide some cues as to who the suspect is. Only a videotape of the entire proceedings would reveal these biases. Although it might be too expensive at this time to require a videotape to be made of every lineup, since in some police departments videotapes are not yet readily accessible, the guidelines explicitly permit the use of videotapes.

(12) ***Donning Distinctive Clothing.*** **If a witness describes the suspect as wearing a distinctive item of clothing or a mask, and it would assist the witness to see the lineup participants wearing such clothing, and if the item**

(or something similar) can be conveniently obtained, each participant shall don the clothing in the order of his or her appearance in the lineup. If there is a sufficient number of masks or items of clothing, all participants shall don the clothing or masks simultaneously.

COMMENT

There is some evidence suggesting that witnesses, aside from simply being able to identify the clothing, may be better able to identify the offender if he or she is dressed in the clothes worn at the time of the offense. The theory is that the suspect's features may only assume significance to the witness when they are shown in conjunction with the other stimuli present at the original observation. There are two possible explanations for this phenomenon. First, there might be something about the offender's facial features which the witness has associated with the clothing worn by the offender. This information would be stored in the witness's subconscious memory and would be retrievable only by the simultaneous presentation of the offender's face and the related object. Second, if the offender wore clothing that served to obscure aspects of his or her facial features at the scene of the crime, but did not wear them at the lineup, the witness's recognition might be impaired by the presence of extraneous stimuli. For example, the sight of hair on a person who had previously worn a hat might serve to confuse the witness and distract his or her attention from the features that might, if presented by themselves, stimulate recognition.

However, although simulation of clothing may sometimes assist accurate identification, it can substantially increase the risk of mistaken identification, if the proper precautions are not observed. A suspect should never be required to don clothing similar to that worn by the offender, unless the other lineup members are required to do the same. As explained in the commentary to Rule 505(6), if only the suspect is wearing the clothes worn by the person the witness saw, the witness may simply recognize the clothes worn by the suspect as being similar to those of the offender, and conclude that he or she must be the offender.

Case Law

From the reported cases, it would not appear to be uncommon for the police to request the suspect to don certain clothing at the request of the witness. The courts have not commented adversely on this practice, even though other lineup participants were not invited to don the clothing.[335]

Present Practice

Police in about half of the cities reported that if, for example, the offender was wearing a mask at the time of the alleged offence, at the request of a witness, they would ask all participants in the lineup to don masks. In some cities, all participants would don masks together; in other cities, they would don the mask in turn. The police in Kingston reported a case in which all those in the lineup were required to wear nylon stockings over their faces.

(13) ***One-Way Mirror.*** **Witnesses may view the lineup from a viewing room equipped with a one-way mirror.**

COMMENT

The use of one-way mirrors in conducting identification parades is now common in Canada. This procedure contributes to the fair and effective conduct of the lineup in a number of ways.

First, viewing the lineup from behind a one-way mirror reduces the anxiety that a witness might otherwise feel in a face-to-face confrontation. It also encourages the witness to undertake a longer and more careful study of all the lineup members. A witness might feel uneasy about having to stare face-to-face at the participants and may, therefore, make a hasty identification. Particularly if the witness is the victim of a violent crime, he or she may feel uneasy about the possible presence of the attacker in the lineup. Numerous studies have shown that it may take considerable time to recall faces from long-term memory; therefore, procedures that encourage witnesses to take more time, such as one-way mirrors, are likely to enhance recognition. Indeed, it has been found that identification performance is improved when witnesses are distanced from the lineup by the use of a one-way mirror. Dent and Stephenson report that "identification performance was best in the one-way screen condition, with 40 per cent correct identifications, and worst in the conventional parade condition, with 18 per cent correct identifications."[336] The reduction of stress was given by the experimentors as an explanation for these results.

A second way in which one-way mirrors may serve to reduce incorrect identifications is by ensuring that suspects will not know exactly when they are being subjected to the witness's attention — something that causes even innocent suspects considerable tension. This tension might well be evident, and the witness might incorrectly interpret the innocent suspect's nervousness as evidence of guilt. If suspects are less aware of

the eyewitness's presence, they are less liable to display what witnesses might mistake for consciousness of guilt.

A final advantage of one-way mirrors is that some witnesses, who might otherwise refuse to attend a lineup or be reluctant to identify a suspect when they do attend, will be more inclined to make an identification, because their identity can remain unknown. Of course, witnesses will be required to testify in open court during the prosecution of any identified person, but by then their fears might have diminished, the suspect might be in custody, or in some cases the person might not be placed on trial.

The use of one-way mirrors raises at least two dangers. First, although stress might affect perception and the decision-making process, in some instances this may be beneficial. The stress and the personal interaction present in a face-to-face confrontation might tend to inhibit a witness while making an identification. That is, by becoming personally involved, witnesses, particularly those who have been victims and are anxious to achieve retribution, may be more reluctant to make an identification that may ultimately send a person to prison, unless they are absolutely certain of their choice. The use of a one-way mirror removes this personal interaction and thus makes the identification decision that much easier.

Second, the use of one-way mirrors prevents suspects from observing the procedure by which the witness actually selects a suspect. This danger may be partially alleviated by having the suspect's counsel present, and by using an accompanying officer who is not involved in the case and is unaware of the suspect's identity.

Present Practice

Police in all cities, except Guelph, report that they use one-way mirrors.

(14) ***Simulating Conditions.*** **The conditions prevailing at the scene of the offence may be simulated by, for example, altering the lighting in the lineup room, varying the distance from which the witness views the lineup, or concealing aspects of the suspect's appearance that the witness did not observe.**

COMMENT

If the lineup is to serve as a genuine test of the witness's ability to identify the offender, the witness should be asked to attempt the

identification under conditions similar to those under which the original observation took place. Thus, if witnesses saw the offender at a distance and under poor lighting conditions, they should view a lineup under approximately the same lighting conditions and at the same distance. That is to say, witnesses should only be permitted to see the suspect's features as clearly as they saw those of the offender.

If the conditions of the first observation are simulated, the only cues the witness will be able to use are those characteristics of the offender that were observed at the scene of the crime. Witnesses who, for example, caught only a fleeting glimpse of the offender, or who saw him at a distance of 100 feet, should not necessarily be allowed to engage in a close study of the suspect in a lineup only ten feet away. The danger of such close scrutiny is that such witnesses might identify a suspect on the basis of mannerisms they think reflect unconscious signs of guilt, or on the basis of a characteristic they imagined the accused had, or about which someone else informed them.

Although the case for attempting to simulate the conditions at the scene of the original observation seems obvious, there are some practical difficulties. First, a simulation of the earlier conditions might only serve to compound the problems of imperfect perception. If a witness was prone to err during the first observation, his or her identification might be even more unreliable if obstacles to careful and complete viewing are deliberately erected at the lineup. This might not be true if uncertain witnesses could be trusted to refuse to make an identification. However, experience has shown that many witnesses will readily identify the lineup member who bears the closest resemblance to their sometimes vague and incomplete memory of the offender. Given the pressure on witnesses, it might be dangerous to deprive them of a clear view of the suspect. On the other hand, there is a possibility that witnesses will be less inclined to guess if the original conditions are simulated, provided they have been properly instructed, and they may indeed be more inclined to admit frankly that their original observation must have been too inadequate to permit subsequent identification.

A second practical problem involved, in attempting to simulate conditions under which the original observation was made, is that it will be impossible to provide a perfect re-creation of the crime. The witness may not be able to judge accurately or describe factors such as light, time and distance. Moreover, it will not be possible to re-enact the crime or to re-create the witness's emotional state. Any attempt at simulation will be, at best, approximate. If the conditions created at the lineup are less favourable to accurate observation than those prevailing at the scene of the crime, the witness may not be able to identify the offender. If they are more favourable, a suspect who is identified will be less able to argue

at trial that the witness is unreliable because his or her original opportunities for observation were poor.

A third danger of simulating the conditions of the original observation is that the jury may assume that the lineup was conducted under precisely the same conditions as existed at the scene of the crime. In other words, the simulation might contribute to the erroneous but understandable belief on the part of some jury members that the lineup procedure is a far more precise, scientific and reliable test than it actually is. However, this misapprehension can perhaps be cured by a careful instruction to the jury.

Fourth, often when there are two or more witnesses who viewed the offence from the same distance and at the same time, they will disagree on what the distance, period of observation and lighting conditions were. It would be illogical to create different viewing conditions at the lineups viewed by these witnesses, since that would necessarily mean that at least one of them would view the lineup under conditions unlike those present at the scene of the crime. Yet, on what basis will it be decided that the conditions described by one witness will be preferred to those described by the other?

Finally, many lineup facilities do not lend themselves to re-creating the original viewing conditions.

Thus, there are a number of obvious difficulties and dangers in attempting to simulate the conditions of the original observation. However, in some cases even a crude approximation of these conditions might improve the reliability of the identification test.

The guideline also suggests that aspects of the suspect's appearance that would not be visible to the witness at the original viewing should be concealed at the lineup. For example, it sometimes happens that the witness does not see the offender's face at all, yet claims to be able to identify the suspect's body type or hands, for example. There would appear to be no reason to show the suspect's face to such a witness. It could only distract the witness and give rise to the possibility of the identification's being based upon some extraneous factor such as criminal stereotyping.

Case Law

The facts of the reported cases reveal no instances in which attempts were made at the lineup to simulate the conditions at the scene of the crime. However, an Indian case touched on the danger of permitting a witness to engage in a close study of the suspect:

> [W]e should like to emphasise that during the commission of an actual offence a witness seldom has a chance of peering closely into the face of the offender, so that if at an identification an identifier was found doing so the Magistrate should not hesitate to make a note of this in his memo, in which case the Court will immediately view the witness' identification with deep suspicion.[337]

There are also many reported cases where arguably the conditions at the scene of the crime, including the condition of the eyewitness at the time, should have been simulated. For example, in *R.* v. *Zarichney*[338] the witness was a 77 year-old woman who ordinarily wore glasses, but was not wearing them when she observed the three offenders at night. She picked the three accused out of separate lineups, but there is no suggestion that she was asked to view the lineups without her glasses. In *R.* v. *Baldwin*[339] the robber wore a mask through which only his eyes could be seen. The witness said that she identified the accused at a lineup by his "eyes, and his build".[340] There was no suggestion that the accused and the other lineup participants ought to have been required to wear masks.[341]

Present Practice

Because of the lack of facilities, only a small number of police forces are able to simulate lighting conditions at the identification. The majority of police reported that the lighting and the distance of the eyewitnesses from the lineup are set. None reported any special efforts made to simulate the conditions of the original observation.

(15) ***Compelled Actions.*** **Lineup participants may be invited to utter specific words or to perform reasonable actions such as gestures or poses, but only if the witness requests it, and only after the witness has indicated whether or not he or she can identify someone in the lineup on the basis of physical appearance. If possible, the identity of the lineup participant who is asked to engage in a particular action shall be unknown to the witness.**

COMMENT

A witness may be able to identify the offender because of his or her physical appearance or because of some other characteristic such as a peculiar mannerism or voice inflection. A lineup, however, is designed solely to test the witness's ability to recognize the offender's physical appearance. Therefore, it is important that nothing be done at the lineup which might cause the witness to identify the suspect on some basis other than physical appearance. The details of this guideline follow from this premise.

Voice Identification[342]

Occasionally, people can identify others by the sounds of their voices, but the ability is generally overrated. However, if a witness asserts that the offender had a very distinctive voice, his or her ability to recognize the voice is of some probative value.

A number of rules apply to voice identification. First, a lineup participant should only be asked to speak when a witness requests it. A witness who does not express the desire probably did not take any particular note of the offender's voice. If the police, on their own initiative, ask one of the lineup participants to speak, that could be taken as a cue to the identity of the police suspect. If the police ask all lineup participants to speak, not only might it not be helpful to identification efforts, but also it might serve to confuse the witness and possibly prejudice a suspect whose voice is distinctive.

Second, if a witness asks to hear the voice of some or all of the lineup participants, he or she should first have to state whether it is possible to identify any lineup participant on the basis of physical appearance. The danger inherent in allowing a witness to hear a lineup participant's voice before making an identification on the basis of appearance is that the two matters might become permanently merged in the witness's mind. It will not later be possible for the witness to assert with any confidence that the identification was based on the suspect's voice or appearance. If the witness's identification of the accused relates only to voice resemblance, it should be the jury that determines whether this is sufficiently probative to conclude safely that an identity exists between the accused and the offender. The question should not be confused with the witness's ability to identify the accused on the basis of physical appearance. Also there is a danger, in hearing the suspect's voice, that is similar to the danger raised when witnesses observe the suspect's distinctive marks. Just as witnesses might attach too much significance to the fact that the suspect bore a scar, they might be unduly influenced by the fact that the suspect spoke with an accent, for example.

If the witness identifies a person in the lineup and then wishes to hear that person's voice, the witness should be asked to identify the voice without knowing the identity of the speaker. Ideally, witnesses who claim an ability to recognize the offender's voice should be required to attend two separate lineups — one would serve as a test for likeness in appearance, and the other for likeness in voice. The lineup was presumably assembled because of the similarity in the physical appearances of the participants, not the similarity in the sounds of their voices. However, at the very least, when the lineup participants are asked to speak, the identity of the speaker should be obscured by turning off the lights, or by some other way.

If a lineup participant is requested to speak after being identified by the witness, another question arises: What words or phrases should be uttered? It is usually thought that the witness will most readily recognize a voice that repeats the words used by the offender. On the other hand, it can be argued that the witness's emotional reaction on hearing these words might impair voice recognition, or that the witness might identify the person simply because of the words spoken. Because of these dangers, it is suggested that if members of the lineup are to be required to speak, they should not repeat the words allegedly used by the offender, but should rather repeat similar-sounding words.

Compelled Actions

Much of the discussion concerning voice identifications at lineups is equally applicable to the question of whether some or all of the lineup members should be required, at the request of the witness, to walk or perform other gestures or bodily movements. The objection to this practice, once again, is that the lineup is composed of people whose only similarity relates to appearance. The suspect who happens to walk with a limp may, therefore, be identified on the basis of this characteristic, even though his or her appearance stirred no recognition in the witness's mind. On the other hand, the witness who, on the basis of appearance alone, would have identified a suspect may not do so after observing, for example, that unlike the offender, he or she does not have a peculiar gait. Therefore, it is proposed that the witnesses who request to see the lineup members walk or engage in similar action should first be required to state whether they can identify someone in the lineup on the basis of physical appearance. They can then request all persons to engage in some action.

There is, of course, some question about whether it is very useful for the witness to identify a suspect on this basis at all. If a witness described some peculiarity in the offender's walk, for example, which is also possessed by the accused, this would serve as independent evidence of the suspect's identity irrespective of the witness's identification. The fact that the witness, after viewing a lineup, states that the suspect's manner of walking resembled the offender's is not particularly helpful, unless it is particularly difficult to describe the suspect's gait.

Case Law

It is clear that evidence of any actions by the accused that might assist in identifying him or her are admissible. In *Attorney General of Quebec* v. *Begin*,[343] Fauteux J. offered the following *obiter* remarks:

> [T]o my knowledge there has never been ... exclusion, as inadmissible, from the evidence at trial, of the report of facts definitely incriminating the accused and which he supplies involuntarily, as for example: his bearing, his walk, his

clothing, his manner of speaking, his state of sobriety or intoxication; his calmness, his nervousness or hesitation, his marks of identity, his identification when for this purpose he is lined up with other persons ....[344]

In *Marcoux and Solomon* v. *The Queen*,[345] Mr. Justice Dickson considered whether forced participation in a lineup violated the privilege against self-incrimination. In concluding that it did not, he went on to say:

> An accused cannot be forced to disclose any knowledge he may have about an alleged offence and thereby supply proof against himself but (i) *bodily condition*, such as features, exhibited in a courtroom or in a police line-up, clothing, fingerprints, photographs, measurements ... and (ii) *conduct* which the accused cannot control, such as compulsion to submit to a search of his clothing for concealed articles or his person for body markings or taking shoe impressions or compulsion to appear in Court do not violate the principle.[346]

The use of voice as a means of identification has been held admissible in several cases,[347] and has been held to be particularly relevant in cases in which the suspect's voice is distinctive.[348] In a case in which a witness identified the accused by his voice for the first time in court, the court stated that such evidence alone was sufficient to support a conviction.[349]

The Ontario case of *R.* v. *Olbey*[350] illustrates how a witness's visual identification of the suspect may be supported by voice recognition. At the lineup, the witness, at a distance of five or six feet from the suspect, said: "I think that's him". As she drew closer, she trembled. The suspect said, "I am not going to hurt you", whereupon the witness said, "that's him". At trial she testified that she recognized his voice.[351] Similarly, in *Craig* v. *The King*,[352] the witness tentatively identified the accused by pointing to him and saying: "This is the type of man so far as I can recollect."[353] He then asked the accused to speak and afterwards made a more positive identification.

There are no Canadian cases that have addressed the issue of whether compelling a suspect to speak for the purpose of voice identification is a violation of a person's privilege against self-incrimination. However, in *Marcoux* v. *The Queen*[354] Mr. Justice Dickson referred with apparent approval to several American cases that suggest the accused could be forced to speak at a lineup:

> [I]n the more recent case of *United States* v. *Wade*, [the U.S. Supreme Court] considered whether a suspect's privilege against self-incrimination had been violated when he was forced to stand in a line-up, wear stripes on his face and speak certain words. The majority of the court held that neither the line-up itself nor anything shown by the record that Wade was required to do in the line-up violated his privilege against self-incrimination.[355]

Present Practice

In most cities the police will ask someone in the lineup to speak, walk or make some other gesture, or engage in some other activity if the witness requests it, even before the witness has stated whether he or she can identify someone on the basis of physical appearance. However, where the witness asks a particular person in the lineup to do something, everyone in the lineup is asked to do it.

(16) ***Method of Identification.*** **A large number shall be held by all lineup participants or marked on the wall above them. Witnesses shall identify the person they saw by writing down the number held by, or appearing above, that person. To confirm the witness's identification, that person shall be asked to step forward and the witness shall be asked if that is the person.**

COMMENT

The traditional view is that witnesses should be instructed to signify any identification they wish to make by walking up to and touching the person. Touching is regarded as the best method of identification because it will remove all possibility that witnesses may incorrectly communicate their selection to the identification officer. In addition it might be argued, that witnesses who are required to touch the person whom they wish to identify will be less inclined to make an identification just because they believe it is expected of them, or on the basis of mere resemblance. On the other hand, some people might fail to make an identification because they are afraid to touch the person whom they believe to be the criminal.[356]

Whatever the advantages or disadvantages of touching as a means of identification, it will not of course be possible without considerable inconvenience if lineups are viewed through one-way mirrors.

The alternatives to touching are pointing, describing the position of the suspect (for example, "third from left"), or referring to a number that identifies the suspect. It is suggested that the best practice, because it is the most unambiguous, is to ask the witness to identify the offender by reference to a number either pinned on the clothing of the lineup members or marked on the wall above, or floor in front of them. As a precaution against mistaken communication, the supervising officer should request the person signified to step forward and should then ask the witness if this is the person whom he or she wishes to identify.

(17) ***Final Objection.*** **After the departure of the witnesses, suspects or their counsel shall be asked whether or not they have any objections to the manner in which the lineup was conducted.**

COMMENT

Inviting the suspect to make objections at this point might permit the identification officer to correct any errors in the procedure. It will also preserve for the record any objections the suspect might have, so that they can be referred to in evaluating the reliability of the lineup procedure at trial.

(18) *Location of Witnesses.* **Before viewing the lineup, witnesses shall be placed in a location from which it is impossible to view the suspect or the distractors.**

COMMENT

Care should be taken that the witnesses view the lineup in an orderly and controlled fashion, under circumstances designed to avoid any suggestion of the suspect's identity. If the witness should happen to see the suspect or distractors before the lineup is conducted, the opportunity to test the witness's ability to make an independent identification might be lost.

(19) *If More than One Witness.* **When there is more than one witness, the witnesses may view lineups composed of different distractors.**

COMMENT

If there are a number of witnesses to a particular crime, it would be extremely inconvenient for the police to arrange a lineup composed of different distractors for each witness. However, if it is possible for the witnesses to attend at different times, then this is the preferred practice.

It is extremely difficult, even under ideal conditions, to determine whether a lineup is unbiased. By placing the suspect in differently composed lineups, there is some opportunity to verify independently the fairness of the lineups. If the suspect is independently selected from two different lineups, it is less likely that he or she has been selected because of a bias in the lineups.

(20) *Paying Distractors.* **Distractors may be paid a nominal fee.**

COMMENT

Witnesses and jurors are both provided with an honorarium as partial compensation for the inconvience caused them. There would appear to be

no reason for not extending this courtesy to lineup distractors. Even a minimal fee may make it easier to obtain distractors.

Rule 506. Lineups Held at Location

If, because of the significance of the context, a more accurate identification may be obtained, the lineup may be held, at the discretion of the supervising officer, at the location where the witness observed the offender committing the offence. In these circumstances, the rules of procedure for conducting a lineup as set out in these guidelines shall be followed to the extent possible.

COMMENT

The rationale for this rule derives from psychological evidence that suggests a witness may be better able to identify the suspect who is presented for viewing in a context similar to that in which he or she was purportedly originally seen.[357] The underlying theory is that the witness's recognition may be triggered by the presence of objects which may have become subconsciously associated with the offender during the initial viewing. This phenomenon has been labelled "contextual cueing" by psychologists and has been well documented. For example, it has been found that photographs originally presented to the viewer in pairs were more accurately identified when they were subsequently presented together, rather than separately or with different photographs.[358]

The guideline provides no clear standard as to when a lineup should be held at location; it leaves the matter to the discretion of the supervising officer. Reviewable standards cannot be formulated at this time, since there is no clear evidence as to when contextual viewing is likely to be most helpful to witnesses. For example, some experimenters have concluded that although accuracy of recall is greater when an object's context is presented, this only holds true if the context is appropriate to the object; use of an inappropriate context results in more false identifications than non-contextual presentations. A recent study[359] has distinguished between "intrinsic context", referring to "aspects of a stimulus which are inevitably processed when the stimulus is perceived and comprehended"[360] and "extrinsic context", involving the irrelevant aspects of processing a stimulus situation. The authors concluded that only the intrinsic context influences one's recognition memory, "because the context determines what is learned, and subsequently guides the subject back to the interpretation of the stimulus that occurred during acquisition."[361]

Certainly, contextual cueing is a subject that requires further experimental testing before any conclusions can be reached about the

efficacy of particular lineup designs. Nonetheless, since the preliminary evidence clearly suggests that it might assist the witness, Rule 506 provides that, in appropriate cases, the lineup may be held at the location where the witness first observed the offender.[362]

Rule 507. Blank Lineups

(1) ***When Held.*** **To determine whether a witness is prepared simply to select the most likely looking participant out of the lineup as the suspect, the witness may be asked, at the discretion of the supervising officer, to view more than one lineup. One or more of these lineups may be blank lineups. A blank lineup is one that does not include a suspect.**

(2) ***Rules of Conduct.*** **The rules for the conduct of lineups set out above shall apply to blank lineups, except that the blank lineup and the subsequent lineup in which a suspect appears shall be composed of not less than five participants who are of the same general appearance as the suspect. The witness shall not be informed of the number of lineups that he or she will be asked to view.**

(3) ***Distractors.*** **No person who appears in a blank lineup may subsequently appear in a lineup in which the accused appears, except as provided in Rule 507(4).**

(4) ***Misidentification.*** **If a witness identifies a participant in the blank lineup, he or she shall not be told that the participant is not the suspect. However, the witness may be invited to view a subsequent lineup in which both the suspect and the person originally identified by the witness appear.**

COMMENT

In a blank lineup procedure, the witness views at least two separate lineups.[363] A suspect is not present in one or more of these lineups.

Such a lineup procedure may be helpful in assessing the credibility of witnesses who are so anxious to assist the police in a criminal investigation that they will identify the lineup participant bearing the closest resemblance to the alleged offender. A decoy is in effect provided to screen out such witnesses. The credibility of witnesses who choose a member of a blank lineup would be open to attack at trial, whereas the evidence of witnesses who resist identification of a member of the blank lineup would be strengthened. The ultimate result would be a reduction in the number of innocent persons subjected to the criminal justice process on the basis of inaccurate identification, and perhaps an increase in the number of guilty people convicted because of the added strength of the evidence.

Nevertheless, objections may be made to this practice. First, there is the practical difficulty of assembling a sufficient number of volunteers to form two lineups. However, it is not mandatory that the blank lineup's numerical composition be as great as that required of single lineups in which a suspect appears — the guideline provides that a blank lineup need only consist of five participants.

Another objection is that it is unfair to trick witnesses or to make their task too difficult, particularly since the witness is cooperating with the police in attending the lineup. However, the hardship suffered by a misidentified accused far outweighs the embarrassment or disappointment experienced by witnesses who discover that they have identified a lineup volunteer or have been shown a "blank" lineup. In addition, all witnesses will have received a warning or caution before viewing the lineup, and an admonition that they should not feel compelled to identify someone. Furthermore, the conducting of blank lineups as envisaged by these rules would not be deceptive. The first lineup is a blank lineup, the second is a "real" lineup. In the procedure contemplated by these rules, witnesses would be told that they will be viewing more than one lineup, each one of which may or may not contain the suspect, but they will not be told how many lineups they will be viewing.

The final major objection is that blank lineups may ultimately operate to exacerbate the problem they were intended to solve. This concern was expressed by the Devlin Committee:

> If the suspect were not on the first parade but on the second and the witness had failed to identify anyone on the first parade, he might feel, as the psychologists agree, under even more pressure to identify someone in the second parade than may not be the case with just one parade.[364]

This argument is quite logical, since the Committee contemplated that the witness "be told that he would be required to view two parades in only one of which a suspect would be standing". If, however, witnesses are not told how many lineups they shall view, the problems perceived by the Devlin Committee should not arise.

The increased reliability of identifications derived from a blank lineup procedure, and the resultant enhanced efficacy of the pretrial identification procedure, should outweigh the mainly practical objections made to the use of blank lineups.

The use of blank lineups is not made mandatory, since it might appear to be a radical change from the present practices and there might be considerable police resistance to it. Furthermore, although it would appear to be a more reliable identification test than the present lineup procedure, there is insufficient empirical evidence to confirm that it is demonstrably better.

It was not possible to draft a reviewable standard as to when blank lineups should be used. Therefore, their use is left to the discretion of the supervising officer. As administrative and other experience as to the value of blank lineups is gained, it might be possible at some future date to draft standards as to when they must be used, or perhaps make their use mandatory.

Case Law

There is no record of blank lineups being used in any Canadian or Commonwealth cases. However, American courts have approved the use of blank lineup procedures.[365] In an American case the procedure was described as follows:

> ...Brown was tentatively identified by a witness from a profile view in a photo. Rather than compound a possible error by allowing a suggestive in-court identification of the defendant sitting at counsel table, Judge Peter McQuillan first conducted an in-court blank line-up without the defendant present, followed quickly by a line-up containing the defendant. The witness picked a police officer out of the blank line-up as the person who perpetrated the crime. The witness was then removed from the courtroom and another line-up including the police officer the witness picked out, the defendant, and two participants from the first line-up, as well as three additional stand-ins, were presented to the witness. The witness again picked out the police officer as the person most resembling the perpetrator and the defendant was subsequently acquitted.[366]

In some American cases, the police have tested a witness's identification of the accused by deliberately suggesting that another person was, in fact, the offender. For instance, in *Commonwealth* v. *Robinson*,[367] the accused occupied position number 2 in a lineup consisting of five men. In order to establish certainty, one of the police officers told the witness that "No. 1 is your man". When the participants filed in, the witness denied this and identified No. 2 as the man.[368] Similarly, in *People* v. *Kennedy*,[369] a police officer took the witness to a room and instructed him to look around the room carefully and see if he could identify a particular man. The officer added the following words of admonishment: "Mr. Davis, be awful careful in your judgment. This is a serious matter. It may involve the life of a man, and, if you ever exercised care in your life, do it now". The witness walked over and pointed to the accused without hesitation. The officer immediately stopped him and said, while pointing to another man, "You have made a mistake. Ain't it that man? Get up and look at him. Ain't that the man?" The witness replied, "No", and confirmed his identification of the accused.[370]

Yet, in *People* v. *Guerea*,[371] a reported case actually dealing with blank lineups, the defendant's request for a blank lineup was denied on the ground that the court did not have the authority to order such a

procedure without a corresponding legislative power. Nevertheless, the court did recognize the advantage of a blank lineup in reducing the suggestiveness of the standard lineup procedure where a witness expects to view the suspect. Moreover, the court acknowledged that an identification of a defendant in a second lineup, after a blank lineup was first presented to the witness, would be "strong evidence of independent recollection of the individual identified."[372]

Present Practice

Although police in a few cities reported that they had heard of blank lineups, only in Montréal had they ever been used.

Most police departments reported that they could foresee a number of problems with blank lineups. Blank lineups, it was suggested, would confuse the witness, increase the number of distractors, be unfair to the witness, and increase the distrust of the police. Finally, it was suggested that they were unnecessary.

Two police departments reported that they could see no difficulties with blank lineups and that they might be advantageous in certain circumstances. In Montréal, where blank lineups have been used, the police reported no problems in conducting them, and said that this procedure assisted in gauging the credibility of witnesses. They also noted that if a witness was truly able to make an identification, he or she should not be influenced by a blank lineup.

Rule 508. Sequential Presentations

(1) ***When Held.*** **To determine whether a witness is prepared simply to select the most likely-looking participant out of a lineup as the suspect, participants may, at the discretion of the supervising officer, be presented to the witness sequentially instead of in a lineup.**

(2) ***Rules of Conduct.*** **The rules for the conducting of lineups set out above shall apply to sequential presentations to the extent possible. The witness shall not be told how many potential participants there are, and shall be instructed to indicate the person he or she saw, if and when that person appears.**

(3) ***Misidentification or Failure to Identify.*** **If a witness identifies a participant who is not the suspect, he or she shall not be told that the participant is not the suspect; however, the witness may be invited to view the remaining participants. If a witness fails to identify anyone, he or she may be invited to view all the participants in a lineup.**

COMMENT

As mentioned many times in these commentaries, in traditional lineups there is always the danger that the suspect will choose the most likely-looking person. Blank lineups were suggested as one technique to minimize the danger. Another and perhaps preferable technique is the use of a sequential presentation.

Using this technique, each participant (who would otherwise be a participant in a conventional lineup) enters the viewing room alone, stands facing the witness for a certain period of time, and then leaves. Thus witnesses would see each participant in turn and would have no basis for comparing which one most closely resembles the person they saw. Since witnesses would not be told how many participants they would be seeing, there would be no temptation to select one of the last participants.

This technique has a number of advantages over the conventional lineup. First and most importantly, for the reasons mentioned above, it would reduce the danger that the witness would simply select the most likely-looking participant, whether this is done on the basis of who best resembles the witness's memory of the person he or she saw, or on the basis of other cues, such as the relative nervousness of the participants. Second, it removes the bias inherent in a lineup when the distractors know who the suspect is, which is often difficult to control. Third, it would provide better information on how readily witnesses made their choice, and how certain they were of the choice. Fourth, since the lineup participants would walk into the room and face the witness, this technique provides a more realistic test of the witness's ability to identify the suspect. (Of course, if the suspect has, for example, a peculiar gait, then each participant would have to be stationed before the witnesses were allowed to view the person or they might select a suspect simply because of his or her gait.)

The guideline provides that if the witness does not choose anyone from the sequential presentation, then he or she should be invited to view all the participants standing in a lineup. If the witness then identifies someone as the suspect, that will be some evidence of the accused's identity, but not particularly probative evidence. The justification for this procedure is described in more detail following the guideline which permits the police to hold a confrontation if the suspect is not chosen from the lineup by the witness.[373]

The difficulties in drafting a standard as to when a sequential presentation should be used are the same as those in attempting to draft such a standard for the use of blank lineups. With experience, it might be

possible to gain sufficient facts so that a final judgment can be made about the superiority of the traditional lineup, blank lineups or sequential presentation.

Rule 509. Subsequent Lineups

If a witness does not identify anyone in a lineup (other than a blank lineup) or identifies someone other than the suspect, and a subsequent lineup is held, no suspect or distractor viewed by the witness in the first lineup shall appear in a subsequent lineup viewed by that witness.

COMMENT

It would obviously be improper to allow a witness to view one lineup containing the suspect and then, if the witness does not identify the suspect, subsequently to permit him or her to view another lineup containing the suspect and an entirely new group of distractors. The fact that the suspect would be the only person appearing in both lineups would be a cue to the witness as to who the police suspect is. In addition, the witness might select the suspect out of the second lineup in part because he or she "looked familiar".[374]

Part VI. Showing Photographs

Rule 601. When Photographs May Be Used

The use of photographs to identify criminal suspects is permissible only when a lineup is impractical for one of the reasons specified in Rule 501.

COMMENT

The reasons why lineups are generally to be preferred to photographic displays were discussed under the general comment to Rule 501. However, a lineup will be impractical if the police do not have a suspect, if they are unable to obtain suitable distractors, if it is inconvenient to hold a lineup, if there is a need for an immediate identification, if the witness is unwilling to view a lineup, if the suspect refuses to participate in a lineup, if the suspect's whereabouts are unknown or if the suspect has altered his or her appearance. In these situations, the police may provide a display of photographs in an attempt to have the suspect identified.

Rule 602. Saving Witnesses to View Lineup

Whenever a witness makes an identification from a photograph and grounds for arresting the suspect are thereby established, or whenever the conditions that, under Rule 501, render the conducting of the lineup impossible, impractical or unfair cease to exist, photographs shall not be displayed to any other witnesses. Such other witnesses shall view the suspect in a lineup. Normally, any witness who selects the suspect from a photographic display shall also view the lineup.

COMMENT

In the instances enumerated in Rule 501 (for example, when the police do not have a suspect), a lineup will be impossible or impracticable, and a photographic display will have to be used. The purpose of this rule, however, is to ensure that even, in these instances, a photographic display is used only when necessary. If the suspect is unknown and one witness identifies a suspect from photographs, then all other witnesses should view the suspect in a lineup and should not be shown a photographic display. The reason for this rule is obvious. Rule 501 provides that the lineup is the preferred mode of identification. If the police were permitted to continue to display photographs after a suspect has been determined, then the intent of Rule 501 would be avoided. In a sense, this guideline is unnecessary — if a suspect is chosen from photographs, the exceptions in Rule 501 are no longer satisfied and a lineup should be held under that general rule.

This guideline also provides that if a witness selects a suspect from a photographic display, that witness should view a lineup with the suspect present, in order to confirm (or reject) the identification of the suspect's photograph. A photograph does not furnish a perfect likeness and thus a witness may withdraw a tentative identification upon viewing the suspect in person. The risk in this procedure, as discussed in the comment to Rule 502, is that witnesses at such lineups may likely make an identification based upon their memory of the photograph, rather than their recollection of the suspect's features at the scene of the crime. However, since the witness will be called upon to make a corporeal identification of the accused at trial in any event, it is preferable that the witness view a lineup first. The witness will be under less pressure, in this setting, to confirm the original photograph identification and will also face a more challenging test of his or her recall.

Several safeguards should limit the potential dangers of this procedure. First, this rule anticipates that only one eyewitness will undergo this double identification process, since once a witness identifies

a suspect, the remaining witnesses are required to view a lineup. Second, there should be some time-lag between the photographic display and the subsequent lineup identification. In this way, the image of the photograph will not be as fresh in the witness's memory. Third, witnesses should be cautioned at the lineup not to identify the person whose photograph they saw, but the person they saw at the scene of the crime. Finally, defence counsel at trial will be entitled to challenge the probative value of the lineup identification, and the trial judge will likely warn the jury about the dangers inherent in the subsequent identification.

Case Law

There are a number of cases in which it appears that the police exposed an unnecessary number of witnesses to a photograph of the accused. However, in no reported Commonwealth case has this practice been the subject of criticism by the courts.[375] In an American case where this issue was noted, however, the judge stated:

> The reliability of the identification procedure could have been increased by allowing only one or two of the five eyewitnesses to view the pictures of Simmons. If thus identified, Simmons could later have been displayed to the other eyewitnesses in a lineup, thus permitting the photographic identification to be supplemented by a corporeal identification, which is normally more accurate.[376]

There are, of course, numerous cases in which the courts have criticized the police for showing photographs to witnesses, when the proper course was to hold a lineup.[377] Similarly, the practice of preparing witnesses for a lineup procedure by showing them photographs has been strongly condemned.[378]

When the police were justified in showing photographs, the courts have never suggested that this procedure ought to be followed by a corporeal identification test.[379] In an Australian case, where defence counsel argued that the witness who had first identified the accused's photograph should later have been shown a lineup containing the accused, the Supreme Court of Australia stated: "If she had identified him in a line-up it would have been impossible to say how far she was relying on the photograph and how far on her recollection of her assailant on 17th June, and a line-up might have been harmful to his case. It was certainly not necessary."[380]

The only reported Canadian case in which the police did arrange a lineup after the witness had picked the accused's photo from a properly-shown array is rather exceptional on its facts.[381] The witness identified the accused's photograph from an array shown shortly after an assault, at which time the accused was not a definite suspect. The accused was apprehended two years later and a lineup was arranged. Although the court did not comment on the value of holding a lineup after a photograph identification, it did criticize the police for showing the witness a group of

photographs, including the accused's, immediately before he viewed the lineup.

Present Practice

Police practices with respect to "saving" witnesses to view lineups appear to vary greatly. In cities such as London, where photographic displays are routinely used instead of lineups, all witnesses will view the display. In Kingston, Montréal, Toronto and Calgary, attempts are made to "save" witnesses for lineup viewing by presenting photographs to only one witness at a time. Whether a subsequent lineup or photographic display is held for the remaining witnesses will depend, in Calgary, upon the practicality of holding a lineup, and in Kingston and Toronto, upon the degree of certainty that the original identifying witness exhibits. In Ottawa, however, only one witness at a time will view the photographs, and if the suspect is picked from the photographs, the police will invariably run a lineup which all witnesses will observe.

In most cities, lineups are not held to confirm identifications made from photographs. In Ottawa, however, such a witness would be subjected to a further identification test in the form of a lineup. In fact, this city cited instances in which identifications made on the basis of photographs were revoked when a lineup was viewed. In Toronto, such a lineup will only be held if the accused insists upon it.

Rule 603. Photographic Display Procedure

(1) *Use of Mug Shots*. Photographs used in a display may consist exclusively of previously arrested or convicted persons. However:

(i) the witness shall not be informed of this fact;

(ii) the photographs shall not be of a kind or quality that indicates that they are of arrested or convicted persons; and

(iii) if possible, some of the photographs shall be of people who have not been previously arrested or convicted, and the witness shall be so informed.

COMMENT

There are three reasons why the photographs used in a display should not consist entirely of photographs of convicted persons. First, using some other photographs may encourage witnesses to be more careful in making the identification. If the witnesses know that all pictures are of previously convicted persons, they might be less careful in picking someone out than they would be if they knew that some of the people in the display had never been convicted. Furthermore, mug shots, for

example, are usually taken by the police at the time of a person's arrest. They usually depict dishevelled, unshaven and deadly serious people. Often the pictures make the person look like a most unsavoury character, the kind of person who would be suspected of committing virtually any offence.

A second reason for not using mug shots exclusively is that, in some cases, this will increase the suggestiveness of the display. This danger is most obvious where the police do not have a mug shot of the suspect and are using an ordinary photograph of him or her.

The third and most compelling reason for the rule that photographic displays should not exclusively depict mug shots is that the jury might then become aware of the accused's criminal record, and permit this information to prejudice their verdict. If defence counsel contends that the photographic identification was unfair because the accused's photograph stood out from the rest of the array, the photographic display may have to be produced for the jury's examination. But the defence will be reluctant to do this if the fact that the accused has a record can be inferred from the photograph. Indeed, if it is known that the police only use mug shots in photographic displays, the mere fact that the accused was selected from a photographic display might be sufficient to prejudice the jury.

It was noted earlier that there are very few cases reporting defence challenges to the fairness of the photographic array. This may be due, in part, to the fact that most photographs used by the police are mug shots and thus, the fact that the accused has a criminal record can be inferred from them. The defence often does not wish to inform the jury that the accused has been previously convicted; consequently, improprieties in the identification process may go unchecked.

Although it is clearly desirable that photographic arrays not consist entirely of mug-shot photographs, this rule nonetheless allows such a display to be utilized because of practical difficulties. In some instances, it will be difficult for the police to obtain other suitable photographs. A random inclusion of photographs of members of the public, without their consent, would constitute a serious violation of personal privacy, and it is unlikely that many people would readily consent to allowing pictures of themselves to be used in such a manner. There would be an understandable concern that a witness or juror, viewing the array, might wrongly conclude that the person depicted has a criminal record. There would also be a danger that the person might be mistakenly identified by a witness, and suffer considerable embarrassment and inconvenience, and even a slight risk of wrongful conviction.

Nevertheless, the difficulties in obtaining photographs of people who have never been arrested or convicted may not be insurmountable. If it is

made clear to witnesses and jurors that the photographic displays are not composed entirely from mug shot albums, it may be no more difficult to secure the consent of members of the public to become photograph subjects than it is to secure lineup participants. Since the police practices survey indicates that some police departments do include photographs of persons not previously convicted in their photographic array, it appears that this is not an impossible task.

The photographs used should not bear any notations indicating that the persons depicted have a criminal record. If this requirement were not complied with, the suspect who did have a criminal record noted on his or her photograph would stand out from the others. Also, even if only mugshot photographs were used, the photograph of a suspect who had no record would be conspicuous among other photographs bearing notations indicating previous convictions.

The photographs should also not indicate the date that they were taken or received by the police, since a witness's attention will naturally be drawn to the ones of more recent date.[382] Thus, all notations on such photographs should be removed or covered up; otherwise, there will always be the potential for prejudice to the suspect caused by what may have been considered innocuous markings on photographs.

Case Law

There are no reported cases dealing with these problems.

Present Practice

Virtually all police forces reported that they only made use of photographs of persons with criminal records. However, in most cities, the numbers are cut off the photographs so that it will not be obvious to the witness that they are mug shots. The police in Calgary, however, report that they do not always use mug shots for photographic identifications.

(2) *Alterations of Photographs.* **At the request of the witness, alterations such as the addition of eyeglasses, hats or facial hair may be made to copies of any of the photographs. However, if the witness requests the alteration of a particular photograph, the supervising officer shall ensure that similar alterations are made to copies of at least four other photographs of similar-appearing persons if the police do not have a suspect, and to copies of all photographs in the display if the police do have a suspect.**

COMMENT

A witness may be unable to identify the offender's photograph because of changes in the offender's appearance between the date of the

photograph and the date of the offence. For example, the offender may have had a mustache at the time of the offence, or may have been wearing glasses, but not when the photograph was taken. Consequently, to allow the witness a better opportunity to make a correct identification, alterations to copies of photographs are permitted.

However, the photographs should not be altered until the witness has had an opportunity to examine the unaltered photographs. Otherwise, the alterations might disguise the subjects' other facial features so as to inhibit, rather than assist, in the identification. Consequently, the witness should first be shown an unaltered photographic array and subsequently should be shown the same array in its altered form.

If a photograph is altered, a number of other photographs should be similarly altered. This will ensure that a witness does not identify the altered photograph simply because the alteration itself makes the photograph appear like the person the witness saw at the scene of the crime. In addition, by requiring the alteration to be made to other photographs, the witness is presented with a wider selection of altered photographs and, presumably, will feel less compelled to confirm his or her tentative selection.

If the police have a suspect, and the witness is viewing a photographic display, the alteration should be made to all photographs. In this way, the police will not steer the witness by narrowing down his or her selection in altering only some of the photographs.

A related issue is whether, prior to a viewing, the photographs should be altered so as to conform to the alleged condition of the offender at the time of the original viewing. For example, the lower half of the photographs could be blacked out if the offender were wearing a mask over the lower half of his or her face.

The rationale for doing this is obvious: the witness should not see, or be influenced by, any features seen at the initial observation. This recommendation was made with respect to lineups in Rule 505(5). However, the arguments for disguising lineup participants do not apply with equal force to photographic identification proceedings. First, it is impossible, by altering photographs, to re-create many disguises commonly used by criminals. For example, a semi-transparent silk stocking is a common disguise, but it is impossible to mask photographs in a way that will re-create such a disguise. Second, and most importantly, because a photograph presents human features in only two dimensions, a disguised photograph can never replicate the offender's appearance. Masking the lower part of a photographic subject's face, for example, will remove features the witness may have originally perceived. For example, in spite

of the mask, the witness might have some idea of the shape of the offender's chin, mouth or nose.

It is therefore concluded that photographs should not be altered to conform with the viewing conditions that prevailed at the scene of the crime, unless the witness requests it. Since Rule 602 requires that photographic identifications be followed by a lineup identification procedure, this aspect of the witness's identification evidence can presumably be tested if necessary.

The guidelines require that if any alterations are made to a photograph, they should be made to copies of the photographs. In this way, the originals of all photographs shown to the witness, as well as the altered photographs, can be preserved for trial.

Case Law

Although there is no Commonwealth case law dealing with the alteration of identification photographs, the American case law seems to be in accordance with these guidelines. In one case, it was held to be improper for the police to alter only one photograph in an array of seventeen, by drawing upon it a mustache and a goatee, as described by the identifying witness.[383] It has been held however, that it is permissible for the police to alter only two of six photographs at the request of the witness.[384] The court, in approving of this practice, distinguished between situations in which the police do something to single out the accused, and those in which the police merely seek to assist the witness through techniques designed to stimulate association, after the witness has narrowed his or her choice to two or three subjects.[385]

(3) *Each Person's Photograph Shown Once.* **Normally, photographs of any particular person shall be shown to the witness only once.**

COMMENT

A witness who sees a photograph of the same person in separate arrays will be more inclined to identify that person for two reasons. First, the witness may recall seeing the photograph in a previous array and infer that it must be a photograph of the person whom the police suspect. Second, the face of the person depicted in the photograph may, at the first viewing, unconsciously register in the mind of the witness. Subsequent exposure to the same or another photograph of that person will trigger a flash of recognition in the mind of the witness, who might conclude that he or she must previously have seen the person at the scene of the crime.

Consideration was given to permitting witnesses to be reshown the entire array on another occasion if, for example, they were under severe emotional stress at the time of the earlier identification procedure. However, it was concluded that the better way to deal with this problem is for the police to exercise good judgment, and refrain from conducting the procedure until the witness appears to be emotionally stable. This exception to the rule would not be in conformity with Rule 509 which stipulates that the same suspect shall not appear in subsequent lineups, and could clearly invite abuse of the rule. It should also be noted that this problem is dealt with by Rule 602, where a suspect who has been selected from a photographic display will be shown to the witness in a lineup, and Rule 801(b), where the witness may be confronted with a suspect whom he or she has failed to identify from a photographic procedure.

There might be certain problems in achieving compliance with this rule, but they should not prove insuperable. It will require that a log-book be maintained to record all the photographs shown to each individual witness. However, this should not prove too difficult, since every photograph used by the police should bear a coded number on its back. Beside the name of every witness contained in the log-book, a listing of the photographs seen by that witness can be recorded. Indeed, this is required of the record-keeper in Rule 206(2)(c).

Case Law

There has been at least one Commonwealth case in which the police have managed to secure identification evidence by displaying a photograph of the same suspect in several photographic displays to the same witness. However, while the courts have recognized that the showing of photographs prior to witnesses' viewing a lineup may taint the proceedings, they do not seem to be aware that the repeated showing of a particular person in several photographic arrays may result in an erroneous identification. Thus, in *R.* v. *Sutton*,[386] where the witness was shown three photographic displays, at least two of which contained a photograph of the accused, in ordering a new trial, the court relied upon the trial judge's failure to caution the jury about the improprieties of displaying a single photograph to the witness, and ignored the fact that comparable dangers were presented by the multiple showings of the accused's photograph.

Rule 604. Additional Rules of Procedure for Conducting a Photographic Display When There Is No Suspect

(1) ***Number of Photographs.*** **The witness may be shown the photographs of any number of potential suspects; however, normally not more**

than fifty photographs shall be shown at any one time. To ensure as accurate an identification as possible, a reasonable number of photographs shall be shown to a witness even if a suspect is selected almost immediately.

COMMENT

Where the police have no definite suspect, they often must rely upon the witness's description of the offender. In these circumstances, it is common for the witness to be shown a number, often hundreds, of photographs of potential suspects who generally fit the witness's description of the offender.

In this connection, psychologists have studied the effect that exposure to a large number of photographs has on the ability of a witness accurately to identify the single photograph of the target person. One study found that as the number of decoys preceding the target in a facial recognition test increased from forty to 140, the witness's recognition accuracy decreased.[387] In an earlier study, it was found that witnesses, given a series of 150 photographs, identified the target 47 per cent of the time, whereas witnesses given only five photographs in an inspection series, identified the target 86 per cent of the time that the photograph appeared.[388] These findings may be attributed to the fact that a witness who is asked to examine a large number of photographs becomes fatigued and confused by the photographs of people who, in varying degree, resemble the offender. The clarity of the witness's mental image of the offender may therefore become clouded by exposure to an excessive number of similar faces.

It is not known at precisely what point a witness's recognition ability becomes impaired by continued exposure to photographs. However, on the basis of the available evidence, it seems that a witness will become particularly prone to error if he or she is shown more than 100 photographs in succession. Since several studies have also postulated that recognition ability may begin to decline after a showing of forty or fifty photographs,[389] it is recommended that a maximum of fifty photographs be shown at one time. If the police wish to continue the photographic display, the witness should be given a rest period of at least one day. This rest period may allow the witness's recognition faculties an opportunity to recuperate. Of course, when the photographic identification procedure is resumed, Rule 603(3) must be adhered to: the witness shall not be asked to examine any of the photographs seen the previous day.

This rule should not impose an undue burden on the police, provided that they pre-screen photographs and select only those that fall within the witness's general description. In this way, they should be able to reduce

substantially the number of potential photograph subjects that need to be shown. Although it is possible for the police to hand-pick fifty photos from their mug-shot books or photographic selection, the use of a computer to locate photographs of persons with similar features is becoming more common.[390]

Finally, this rule requires the police to show a reasonable number of photographs, even if a suspect is selected by the witness almost immediately. It is hoped that this aspect of the rule may ensure that the best identification evidence is obtained, since psychological studies report that recognition of the target will be facilitated if the target is presented earlier in the display.[391] It may be that witnesses will be inclined to identify a photograph relatively early in the procedure. Therefore, it will be important for the trier of fact to know whether such a witness subsequently wavers in his or her confidence after viewing further photographs. Evidence that the witness viewed the remainder of the display, and did not retract his or her original identification, will also strengthen the probative values of the Crown witness's identification evidence.

Present Practice

The police in most cities simply scan their mug-shot files looking for photographs that roughly fit the description by the witness. In a number of cities, the mug shots are pre-arranged according to basic physical descriptions. In Toronto, mug shots are retrieved by descriptions from a large base of photographs kept in a computer bank.

(2) *Presentation of Photographs.* The photographs and the manner of their presentation shall not be such as to attract the witness's attention to particular ones.

COMMENT

Obviously, when the police do not have a suspect, there is no danger of their conveying the identity of a suspect to the witness. Furthermore, since the purpose of the showing is to assist the police in their search for possible suspects, and not to test the witness's ability to identify a suspect, it will not be necessary that there be any similarity in the appearances of the subjects portrayed in the photographs. Indeed, at this stage, it would be desirable that the witness be presented with a range of somewhat dissimilar subjects. However, some care should be taken, even at this point, to ensure that no single photograph is so dissimilar to the others as to attract the witness's attention. For example, there should be more than one photograph of a person wearing glasses, particularly where

the witness has described the offender as having worn glasses. The studies reported in the following comment illustrate that witnesses are more likely to select unusual or dissimilar photographs from an array.

Rule 605. Additional Rules of Procedure for Conducting the Photographic Display When There Is a Suspect

(1) ***Type of Photographs.*** **The photographs used in the display shall be of people whose significant physical characteristics are approximately the same. In determining the significant physical characteristics of the suspect, regard shall be had to the description of the offender given to the police by the eyewitness. None of the photographs shall be of a kind, quality or in a state that makes it conspicuous. If possible, the photographs shall be in colour.**

COMMENT

The rationale for this rule is obvious: the witness will not face a challenging test of recall, unless the photographic display depicts similarly-featured persons. The comment following Rule 505(4), the rule that requires lineup participants to be physically similar, discusses this rationale in detail. With respect to photographic displays in particular, psychological studies have confirmed that the photographs used must be of similar-featured persons in order to be a fair test of the witness's ability to identify the suspect.[392]

This rule also requires that the photographs in the array be similar in format. That is, the photographs should be of the same size and colour (i.e., one colour photograph should not be used in an otherwise black-and-white array), and the distractors should be portrayed in similar poses, at the same angle, using the same degree of focus, etc. This is important, because as mentioned above, witnesses will tend to select a photograph that stands out markedly from the others. For instance, one study found that even non-witnesses could select the suspect's photograph from a six-photograph array at a rate "well above the chance level" when the suspect's photograph was displayed on two different angles from the others, and showed him wearing a different facial expression from the other subjects.[393]

The guideline also requires that the photograph be in colour, if possible. Intuitively one would suspect that a colour photograph would lead to better recognition performance than a black-and-white photograph. Colour adds information which could provide a cue for identification. Somewhat surprisingly, some studies have found that the type of photograph (colour or black-and-white) does not affect recognition.[394] The

authors of one study speculated that "although certain cues are available in color pictures, they simply are not used in the identification process."[395] However, in at least one study that replicated a fairly realistic law enforcement situation the authors found that colour was an important aid to identification.[396] Additional research should be undertaken on the kind of photographs that contribute generally to accurate identifications.[397]

Case Law

Somewhat suprisingly, there are few reported Commonwealth cases in which the courts have criticized differences between the appearance of the accused and that of the other subjects in the photographic display, although they often note the similarity in the photographs, and appear to attach significance to this fact.[398] Probably the strongest criticism can be found in a Canadian case where there were numerous defects in the photograph identification procedure, not the least of which was the fact that, of the ten other photographs used, "only one or two resemble[d] the accused and then only remotely."[399] Although the conviction in this case was upheld, because of independent identification evidence, the court stated that the photographic identification evidence was "seriously weakened" by the improprieties and noted that the photographs used in such a procedure should be "all of different people who bear some resemblance to each other."[400]

The American courts have similarly been hesitant to scrutinize the resemblance between the accused and the other photograph distractors. In numerous reported cases, this issue should have provoked strong criticism,[401] but did not.

The courts also appear to be reticent when the complaint is that the accused's photograph was conspicuous in its technical aspects.[402] However, it is clear that some courts will have regard to the types of photographs used when they evaluate the weight to be given to the identification. For example, in *R.* v. *Chadwick, Matthews and Johnson*,[403] it was apparent that the accused's photographs had been more recently taken, and they were mounted on backing cards different from those on which the other photographs were mounted. The verdict of the jury was set aside on the grounds that it could not be supported by the evidence.

(2) ***Number of Photographs.*** **The witness shall be shown an array of photographs composed of the suspect's photograph and those of at least eleven distractors.**

COMMENT

This rule in effect provides that the witness be shown a "lineup" of photographs, and prohibits the police from displaying a single photograph to the witness. The showing of a single photograph raises all of the dangers inherent in a corporeal confrontation, which were discussed in the general comment following Rule 501. In particular, it is highly suggestive and therefore does not provide an adequate test of the witnesses' ability to recognize the offender. The practice of showing prospective witnesses a single photograph of a suspect has been universally condemned by courts, lawyers, psychologists and text writers.

While it is clear that there should be more than one photograph shown to prospective witnesses, there is no magic number of photographs that should be included in the group shown to the witness. Ideally, the number should be large enough to present a fair test of the witness's ability to make an identification. Since presumably it is easier for the police to obtain photographs resembling the suspect than it is to secure lineup participants, the rule stipulates that at least eleven other photographs shall be displayed along with that of the suspect. Rule 505(1) provides that the suspect should be accompanied by at least six distractors in a lineup. The comment following that rule discusses the interests involved in making this choice.

Case Law

Most courts have condemned, in the strongest terms, the practice of showing a witness a single photograph of the accused.[404]

In many Commonwealth cases, convictions have been quashed in part because of the practice of showing the witness a single photograph.[405] However, in a number of cases, the court either failed to comment upon this practice or stated that the identification evidence had been cured by the fact that the procedure used had been disclosed to the jury.[406] Thus, in one such case, the court commented:

> We are all of opinion that there was nothing in the course taken that could be called improper, and nothing that should have led the learned Judge to reject the evidence of Mrs. Abbott or to direct the jury that they should reject it. The fact that she had seen a photograph of the accused before identifying him was something of which the jury were quite rightly informed. It ought to have been disclosed to them and it was disclosed. It was for the jury alone to say how far it influenced them in relying on Mrs. Abbott's memory and powers of observation.[407]

The American courts have also strongly criticized the showing of single photographs to prospective witnesses. However, they have not held that such a practice is impermissible *per se*: single photograph

displays are to be critically scrutinized by the courts, the evidence will be admissible but it may not be considered to be particularly weighty,[408] and the conviction will be upheld if there is other independent identification evidence supporting the conviction.

Although there have been numerous cases in which an accused's photograph was displayed in an undersized photographic array,[409] it appears that only one Commonwealth court has criticized this practice and recommended that a particular number of photographs be used in an array. In *R.* v. *Pace*, sixteen photographs were used, but the effective number of distractors was in fact much lower since six of the photographs were of the accused, only one or two of the other subjects even remotely resembled the accused, and only one of the photographs in the array, that of the accused, was in colour. The court remarked: "[I]f the police deem it necessary to show photographs to witnesses in the course of their investigation of a crime, then they should produce at least a dozen, all of different people who bear some resemblance to each other." [410]

Similarly, the American courts have rarely offered constructive guidance on this issue. It has been clearly stated that there is no requirement that a certain number of photographs be shown to the witness[411] and in fact, one court stated that twelve to fifteen pictures of other individuals would be more than sufficient for a proper photographic display.[412]

Present Practice

Most police forces appear to use twelve to twenty-four photographs in a photographic display.

(3) *Presentation.* The photographs shall be fixed upon a display board in a manner that does not attract the witness's attention to particular ones; or, the photographs shall simply be handed to the witness for his or her examination.

COMMENT

This rule is designed to minimize the danger that the accompanying officer might inadvertently provide the witness with a cue as to the identity of the suspect, by the manner in which individual photographs are provided to the witness; by the officer's becoming more tense when the witness examines the photograph of the suspect; or by allowing witnesses a particularly long period to examine one photograph before handing them the next photograph in the series. There are two possible

ways to minimize this problem. The use of a display board is to be preferred, since the photographs should all be affixed in the same manner and the officer will usually be unaware of which photograph is being examined by the witness. In addition, the exact presentation can be preserved for trial. If this manner of presentation is not feasible, all of the photographs shall be handed to the witness at once, so that the witness and officer will not be influenced by each other's reaction as each photograph is passed. This rule will be less significant if the accompanying officer is unaware of the suspect's identity.

Case Law

The above procedure conforms with that laid down in *R.* v. *Bagley*[413] in which it was held:

> There is no objection to the showing, without any suggestion, a bundle of photographs to an eyewitness of a crime in order that he may identify from them the photograph of the person who committed the crime. But, a witness must not be shown the single photograph of the person accused in order that he may be assisted thereby in making a physical identification in the usual way.[414]

The case law discussed under Rule 203 is also relevant here.

Present Practice

Police in most cities paste the photographs to be displayed onto a display board or hand the photographs to witnesses and let them sort through them. However, a significant minority of police forces report that they hand the photographs to the witness one at a time.

(4) *Blank Photographic Displays.* The witness may be shown a photographic display or handed a group of photographs that does not contain a photograph of the suspect, prior to a display that does contain a photograph of the suspect. In such circumstances, the guidelines for conducting a blank lineup shall be followed to the extent possible.

COMMENT

A detailed justification for and description of the use of blank lineups is given in the commentary following Rule 507. That discussion is relevant here.

A matter of grave concern with respect to all identification proceedings is that witnesses will experience pressure to make an identification, even if they are unsure. There are a number of cases in

which witnesses admitted on cross-examination that they identified the accused because he or she most closely resembled the offender. It is to guard against this tendency that witnesses should first be presented with an array in which the photograph of the accused does not appear. The witness who selects a photograph from this blank array will, therefore, be revealed as somewhat unreliable. The difficulties facing the police in obtaining a sufficient number of photographs to conduct effective blank arrays will not be nearly as great as those involved in assembling sufficient people to participate in blank lineups.

(5) *Multiple Poses*. If more than one photograph of the suspect appears in a photographic display, an equal number of photographs of each subject shall appear.

COMMENT

The suspect may be prejudiced in two ways if more than one photograph of him or her appears in an array otherwise consisting of only one photograph of other people. First, simply as a matter of chance, the likelihood of the suspect being chosen is increased. A second way in which the accused is prejudiced is by the suggestiveness created by the presence of two photographs of the suspect in the array, and only one of all or most of the other people photographed.

Case Law

In *R.* v. *Kervin*[415] the witness, who had previously identified another photograph of the accused, was presented with an array of twenty-five photographs of which two were of the accused. She selected both pictures of the accused. She subsequently picked the accused out of a lineup. The Nova Scotia Court of Appeal, however, dismissed the accused's appeal from conviction, and no comment was made about the suggestiveness of the photographic display. Although in *R.* v. *Pace*[416] the appeal from conviction was dismissed because the conviction was supported by other identification evidence, the evidence of most of the witnesses was not considered by the appeal court because the photographic display was not particularly probative. One factor which weakened the identification evidence was that "of the sixteen photographs, six were of the appellant".

(6) *More than One Witness*. When there is more than one witness, the witnesses may view different photographic arrays.

COMMENT

See Rule 505(19).

Part VII. Informal Identification Procedures

Rule 701. When Informal Identification Procedures May Be Used

Informal identification procedures (viewing the suspect in a natural setting such as a hospital, shopping centre, bus depot, or the scene of a crime) may be used only in the following circumstances:

(a) *Suspect at a Particular Locale.* **When the suspect is unknown, but is known or suspected to be in a particular locale (this includes the procedure of transporting witnesses in police cars to cruise the general area in which a crime has occurred, in the hope of spotting the perpetrator; or taking the witness to restaurants or other places where the suspect might be).**

(b) *Suspect Unable to Attend Lineup.* **When the suspect has been hospitalized or cannot otherwise attend a lineup, but can be viewed along with similar-appearing and similarly-situated people by the witness.**

COMMENT

An informal identification procedure involves arranging for a witness to view the suspect in a natural setting. It is to be distinguished from a purely accidental or happenstance confrontation. For the reasons given in the general comment to Rule 501, an informal identification procedure is normally not a satisfactory test of a witness's ability to identify the person he or she saw. However, in the two circumstances described in this guideline, an informal viewing might be used as a test of identification.

First, an informal identification procedure may be used when a suspect is not known. The police may be searching for the suspect and have reason to believe that he or she is in the vicinity of the crime or at a particular locale. In those circumstances, they might accompany the witness to such a location to see if the witness can identify a suspect. In effect, this procedure serves the same purpose as the viewing of

photographs in police albums. Obviously, this can be an important law enforcement technique.

The second situation in which an informal viewing might be used is where the suspect is known, but is unable to attend a lineup. In this circumstance, the witness might be taken to view the suspect at the place where the suspect is located, such as a hospital. Even in these circumstances, however, a photographic display will normally be a better test of the witness's recall if one is possible. In addition to being able usually to secure a greater number of similar-looking distractors, a photographic display is to be preferred since it is much easier to control and reconstruct at trial than an informal viewing. However, if the suspect is hospitalized, for example, it may be preferable to escort the witness to the hospital, where the witness can view a number of wards containing people similar in appearance to the suspect.

Present Practice

The use of informal identification procedures varies greatly across the country. Some police forces appear to favour them over a lineup. The suspect will routinely be identified seated in a crowded courtroom or in a holding cell. Other police forces will only use them where a lineup is not possible (for example, the suspect refuses to participate). Even in these circumstances, some police forces prefer to use a photographic display because it provides them with more control over the proceedings.

Case Law

The courts have not criticized the police practice of returning to the scene of the crime with witnesses, to see if they can make an identification. One Commonwealth case in which the accused was identified in this way is *R.* v. *Maarroui*.[417] The friend of a person who had been stabbed in a café returned there shortly afterwards with the police and identified the accused as the attacker.

Part VIII. Confrontations

Rule 801. When Permissible

A police officer may arrange a confrontation between a suspect and a witness for the purpose of identification only in the following circumstances:

(a) ***Urgent Necessity.*** **In cases of urgent necessity, as where a witness is dying at the scene of the crime; or, for one of the reasons provided in Rule 501, a lineup, a photographic display, or informal viewing cannot be held.**

(b) ***Lineup or Photographic Display Attempted.*** **The witness was unable to identify the suspect in a lineup, a photographic display, or informal viewing.**

COMMENT

Witnesses are sometimes presented with a suspect who is either standing alone or in the company of police officers, and are asked if they are able to identify the suspect as the offender. This is the most unsatisfactory method of pretrial identification. It does nothing to obviate the unfairness inherent in dock identifications. The witness who confronts a single suspect will find it difficult to resist the almost overpowering suggestion that he or she is the offender. In effect, confrontations "eliminate" the problems associated with dock identifications by shifting them to the pretrial stage. In the comment to Rule 501, all the reasons why confrontations should be avoided are discussed in detail.

Confrontations are prohibited under the rules, even if they are conducted promptly after the offence has been committed, if requested by the suspect, and even if the suspect refuses to attend a lineup. In each of these circumstances, a confrontation might be held under present practices. The guidelines provide for confrontations only in two circumstances: where there is urgent necessity, and where the witness has been unable to identify the suspect at other identification tests. These circumstances will be discussed below.

Prompt Confrontations

Under present practices, if the police obtain a suspect within two or three hours after the crime, they will frequently hold a confrontation. It is thought that the interest in getting a prompt identification outweighs the inherent suggestiveness of the confrontation.

It is argued that a prompt identification serves two important law enforcement interests.[418] First, the identification can be made while the image of the offender's appearance is fresh in the witness's memory. The increase in the reliability of identifications made while the witness's memory is fresh outweighs the potential decrease in reliability attributable to these procedures' suggestiveness. However, recent research has shown that at least after the first few seconds, the memory of faces fades very gradually.[419] Thus, there is no need for a prompt confrontation for this

reason. Another reason sometimes given for the need of prompt on-the-scene confrontations is that if the police do not have the correct person, they can resume their search. However, the likelihood of this being a consideration in more than a few of cases is small. If the police have found one suspect near the scene, the likelihood of finding another, in most cases, would be minimal. Furthermore, in some cases even if an identification of the suspect is not made, the police will have other evidence, for example, the possession of stolen goods, which suggests they have the right person. Thus there would appear to be no great law enforcement advantage for prompt on-the-scene confrontations, and thus no reason to deny the suspect the right to a fair and unsuggestive identification test.

Confrontations at Request of Suspect

Should a confrontation be permitted when one is requested by the suspect?[420] Innocent suspects might prefer to be immediately confronted by the witness instead of going through the trouble of appearing in a lineup, under the naive belief that the witness will invariably clear them of all suspicion. To permit a confrontation at the suspect's request would have perverse results. It would imperil the innocent — the very people for whose protection pretrial identification procedures were designed. Furthermore, guilty suspects might request a confrontation in order to weaken the probative value of the identification test. Thus, confrontations should not be permitted at the suspect's request, even where the police have given a warning of the dangers associated with such a procedure or where the advice of counsel has been obtained.

Other Identification Procedures Impractical

It has been suggested that if the suspect refuses to participate in a lineup, a confrontation should be held. In these circumstances, it will invariably be possible to hold a photographic display or an informal viewing; and both of these forms of identification tests are preferable to confrontations.

Urgent Necessity

The guidelines provide that a confrontation can be held in cases of urgent necessity. The need for this exception is illustrated by an American case. In *Stovall* v. *Denno*,[421] Dr. Behrendt and his wife were stabbed while in their kitchen on August 23rd. The husband died and the wife was hospitalized for major surgery to save her life. On the 25th, the day after the surgery, the accused was brought to Mrs. Behrendt's hospital room, handcuffed to a police officer. Mrs. Behrendt identified the accused after being asked by a police officer whether he "was the man". She later

identified him at trial. In commenting on the identification procedure the Supreme Court stated:

> [A] claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it, and the record in the present case reveals that the showing of Stovall to Mrs. Behrendt in an immediate hospital confrontation was imperative.
>
> Here was the only person in the world who could possibly exonerate Stovall. Her words, and only her words. "He is not the man" could have resulted in freedom for Stovall. The hospital was not far distant from the courthouse and jail. No one knew how long Mrs. Behrendt might live. Faced with the responsibility of identifying the attacker, with the need for immediate action and with the knowedge that Mrs. Behrendt could not visit the jail, the police followed the only feasible procedure and took Stovall to the hospital room. Under these circumstances, the usual police station lineup which Stovall now argues he should have had, was out of the question.[422]

Lineup or Photographic Display Attempted

If the witness cannot pick the suspect out of a properly-conducted lineup or photographic display, but the police still strongly suspect a particular person of the crime, it is permissible under these guidelines for the police simply to confront the witness with the suspect. If the witness identifies the suspect, this identification will likely be of little value. However, if the witness is adamant that the suspect is not the person, this will be relevant evidence for the defence.

Present Practice

Particularly in Ontario, if the police apprehend the suspect soon after the crime, they will frequently return to the scene of the crime immediately and have eyewitnesses attempt to identify him. However, in a significant number of other cities, this is not normal practice. In some cities, it would never be done; in others, it would be done only at the request of the suspect and if the witness agreed to it.

Case Law

Generally the courts have been very critical of the police when a confrontation is held in a situation where a lineup could have been arranged.[423] The courts have even been critical of confrontations when they are promptly held.[424] In the one case, *R.* v. *Denning and Crawley*,[425] where the court failed to object to the police's returning the suspect to the scene of the crime to be identified by the victims, it seems that the accused had, in fact, requested that such a procedure be followed: "The police told him that there had been an attempted robbery.... Crawley denied being concerned with it and asked to be taken there."[426] Even then, the court attached little weight to this identification evidence, since

the descriptions were contradictory and confused: "If it had been the only evidence identifying the applicants with the crime no jury could be allowed to convict on it."[427]

Rule 802. Impartiality During Confrontation Procedure

Whenever possible, in presenting a suspect to a witness for identification, an officer shall not say or do anything to lead the witness to believe that the suspect has been formally arrested or detained, that he or she has confessed, possessed incriminating items on his or her person when searched, or is believed to be the perpetrator. In all cases, the suspect shall be presented to the witness in circumstances that minimize the suggestion that the police believe the suspect to be the offender.

COMMENT

If confrontations are to be tolerated, they should be conducted with as little prejudice to the accused as possible. Thus, the police should not encourage witnesses to identify the suspect as the person they saw by suggesting that they have other evidence against the suspect or that he or she has confessed. Nor should the suspect be presented to the witness in handcuffs. In fact, it would probably be advisable for the police not to say anything to the witness at this point. They should simply appear with the suspect, and let the witness take the initiative in making an identification. In case the witness recognizes the suspect but does not make an identification because he or she does not know it is expected, the police might ask the witness to provide another description of the offender.

Endnotes

1. This is essentially the approach followed by the American Law Institute in drafting its *Model Code of Pre-Arraignment Procedure* (Washington, 1975). In its Code it provided for such matters as the right to counsel at identification procedures, the suppression of evidence of identification, and the general conditions under which identifications should be made. It then provided that "[a]ny law enforcement agency engaged in identification procedures ... shall issue regulations ... implementing the provisions of this Article." The Code then lists a number of objectives of a fair eyewitness identification procedure (Article 160.1(2)).

2. In England there has been some dispute as to whether or not pretrial identification procedures should be subject to statutory control. Traditionally, the conduct of lineups has been governed simply by a circular prepared by the Home Office, *infra* note 12. However, the *Devlin Report*, *infra* note 12, recommended that the rules should be enacted as a schedule to a statute (p. 150). This has also been urged by a number of commentators; see *Justice Memorandum*, 1974, *infra* note 12, p. 17, and Walker and Brittain, *infra* note 24, p. 20. Although the rules were revised by the Home Office in light of the recommendations of the *Devlin Report*, they were not incorporated in a schedule to a statute. Most recently, The Royal Commission on Criminal Procedure (hereinafter cited as the *Philips Report*), Cmnd. 8092 (London: HMSO, 1981), p. 69, recommended that "when the Government is considering legislation in the field of pre-trial criminal procedure it should examine the possibility of making identification procedures subject to statutory control ...".

   The Scottish Working Group on *Identification Procedure under Scottish Criminal Law*, Cmnd. 7096 (Edinburgh: HMSO, 1978), p. 9, noted that the *Devlin Report*'s recommendation to embody some of their recommendations in legislation involved no major departure from "what has become traditional in English law, which in criminal matters favours codification or legislation". However, they noted that in the Scottish legal tradition, practically the whole of criminal law was still left to the common law; therefore, they suggested that the guidelines they recommended should not become statutory, but should be published by HMSO (p. 39).

3. *British North America Act, 1867*, s. 91(27) (U.K.).

4. *Id.*, s. 92(14).

5. See, in particular, ss. 452(1)(*f*)(i), 453(1)(*i*)(i) and 450 (2)(*d*)(i) of the *Criminal Code*, R.S.C. 1970, c. C-34.

6. R.S.C. 1970, c. I-1.

7. (1977), 73 D.L.R. (3d) 491, at 531.

8. (1978), 90 D.L.R. (3d) 161, at 193.

9. *Id.*, p. 193.

10. See generally W. Bellack, *The Constitutionality of the Proposed Guidelines for the Conduct of Pretrial Eyewitness Identification Procedures*, a paper prepared for the Law Reform Commission and on file at the Commission.

11. In the spring of 1979 the Law Reform Commission received the guidelines used in conducting lineups by police forces in the following cities: Toronto, Edmonton, Vancouver, Montréal and Guelph. In drafting these guidelines, we were assisted by these local rule-making efforts. However, although most police forces have a set of guidelines for their members to follow when conducting identification procedures, such guidelines often have shortcomings. They are often far from comprehensive; on many important questions they provide little guidance; they differ from police department to police department; they are often not followed; and, at least in some instances, they do not reflect good law enforcement practices.

12. Home Office, *Identification Parades and the Use of Photographs for Identification*, Home Office Circular No. 109 (London: HMSO, 1978) (hereinafter referred to as *Home Office Circular on Identification Parades*, 1978). The circular contains two separate codes, one governing parades, the other the use of photographs. Each code is divided into rules and a more detailed narrative for the assistance of the police called Administrative Guidance. Neither the rules nor the guidance have any authority in law; they are similar in authority to "Judges' Rules". The circular was published two years later, and embodies many of the recommendations of the *Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases* (London: HMSO, 1976) (hereinafter referred to as the *Devlin Report*). For a comparison of the recommendations of the *Devlin Report* and the rules proposed in the *Home Office Circular 109, 1978*, and a critique of the circular for failing to adopt more of the recommendation of the *Devlin Report*, see M. Walker and B. Brittain, *Identification Evidence: Practices and Malpractices: A Report of JAIL* (London: JAIL, 1978). See also Justice, *Evidence of Identity: Memorandum to Lord Devlin's Committee* (London: Plumridge, 1974) (hereinafter referred to as *Justice Memorandum, 1974*).

13. The regulations for the District of Columbia; Clark County, Nevada; New York City; and Oakland, California are reprinted as appendices in F. Read, "Lawyers at Lineups: Constitutional Necessity or Avoidable Extravagance?" 17 *University of California at Los Angeles Law Review* 339 (1969). Regulations in Los Angeles; New Orleans; and Richmond, Virginia are discussed in Note, "Protection of the Accused at Police Lineups", 6 *Columbia Journal of Law and Social Problems* 345 (1970). The regulations of the Pittsburgh Police Department are set out in an appendix in Comment, "Right to Counsel at Police Identification Proceedings: A Problem in Effective Implementation of an Expanding Constitution", 29 *University of Pittsburgh Law Review* 65 (1967).

14. See D. E. Murray, "The Criminal Lineup at Home and Abroad", [1966] *Utah Law Review* 610; Comment, "Possible Procedural Safeguards Against

Mistaken Identification by Eye-Witnesses", 2 *University of California at Los Angeles Law Review* 552 (1955); Note, "Due Process at the Lineup", 28 *Louisiana Law Review* 259 (1968); Read, "Lawyers at Lineups: Constitutional Necessity or Avoidable Extravagance?" 17 *University of California at Los Angeles Law Review* 339 (1969); Sobel, *Eye-Witness Identification* (New York: Clark Boardman, 1972), ch. 7.

15. American Law Institute, *A Model Code of Pre-Arraignment Procedure* (Washington, D.C.: 1975), ss. 10.3, 160.1-160.7.

16. Project on Law Enforcement Policy and Rulemaking, *Model Rules: Eyewitness Identification*, revised draft, (Arizona: April 1974).

17. Great Britain, Criminal Law Revision Committee, *Eleventh Report; Evidence (General)*, Cmnd. 4991, (London: H.M.S.O., 1972), paras. 196-203; Scotland, Scottish Home and Health Department, *Criminal Procedure in Scotland — Second Report (Thomson Committee)*, Cmnd. 6218 (Edinburgh: HMSO, 1975), chapters 12, 46, and *Identification Procedure under Scottish Criminal Law*, Cmnd. 7096 (Edinburgh: HMSO, 1978); South Australia, Criminal Law and Penal Methods Reform Committee, *Second Report: Criminal Investigation* (Adelaide: A. B. James, Government Printer, 1974), chapters 6, 9, and *Third Report: Court Procedure and Evidence* (Adelaide: A. B. James, Government Printer, 1975), ch. 8; Commonwealth of Australia Law Reform Commission, *Report No. 2: Criminal Investigation* (Canberra: Australian Government Publishing Service, 1975); New Zealand, Criminal Law Reform Committee, *Report on the Question of Whether an Accused Person Under Arrest Should Be Required to Attend an Identification Parade* (Wellington: Government Printer, 1972), and *Report on Identification* (Wellington: Government Printer, 1978).

18. See, for example, *An Act Relating to the Investigation by Members of the Australian Federal Police of Offences Against the Laws of the Commonwealth and of the Australian Capital Territory, and for Purposes Connected Therewith*, ss. 35, 36, Bill 246, given first reading in The Senate, The Parliament of the Commonwealth of Australia, November 18, 1981.

19. See, for example, the essays collected in M. Porgrebin, *The Invisible Justice System: Discretion and the Law* (Cincinnati: Anderson Publishing, 1978).

20. This list of the objectives to be achieved by a detailed regulation of the police conduct of pretrial identification procedures could be considerably lengthened. Professor Kenneth Culp Davis, in his treatise on *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969), pp. 90-91, suggests the following objectives:

> The objectives of a good program for reform of police practices should be (1) to educate the public in the reality that the police make vital policy, (2) to induce legislative bodies to redefine crimes so that the statutory law will be practically enforceable, (3) to rewrite statutes to make clear what powers are granted to the police and what powers are withheld, and then to keep the police within the granted powers, (4) to close the gap between the pretenses of the police manuals and the actualities of police behavior, (5) to transfer most of the policy-making

power from patrolmen to the better qualified heads of departments, acting on the advice of appropriate specialists, (6) to bring policy-making out into the open for all to see, except when special need exists for confidentiality, (7) to improve the quality of police policies by inviting suggestions and criticisms from interested parties, (8) to bring the procedure for policy determination into harmony with the democratic principle, instead of running counter to that principle, (9) to replace the present police policies based on guesswork with policies based on appropriate investigations and studies made by qualified personnel, and (10) to promote equal justice by moving from a system of ad hoc determination of policy by individual officers in particular cases to a system of central policy determination and a limitation of the subjective judgment of individual officers to the application of the centrally determined policy.

21. Even when confronted directly with an important identification issue, the Supreme Court of Canada seems reluctant to suggest standards for the proper conduct of police identification procedures. See S. A. Cohen, *Due Process of Law: The Canadian System of Criminal Justice* (Toronto: Carswell, 1977), p. 84, citing *R.* v. *Marcoux* (1976), 24 C.C.C. (2d) 1, [1976] 1 S.C.R. 763.

22. In the United States, when the Supreme Court was concerned about the dangers of improper police conduct in pretrial identification procedures, it seized upon the constitutional safeguards of right to counsel and the right to due process, and invoked the exclusionary rule because it was unable to draft a comprehensive statute or regulations that might have minimized the risks of wrongful conviction. See H. R. Uriller, *The Process of Criminal Justice: Investigation and Adjudication*, 2nd ed. (St. Paul, Minn.: West, 1979). This obviously was not necessarily the most efficient manner of dealing with the problem.

23. Great Britain, Criminal Law Revision Committee, *supra* note 17, para. 196. Judge Carl McGowan of the District of Columbia Circuit Court of Appeals has noted that many experts feel that faulty identifications present "conceivably the greatest single threat to the achievement of our ideal that no innocent man shall be punished". C. McGowan, "Constitutional Interpretation and Criminal Identification", 12 *William and Mary Law Review* 235, at 238 (1970). The drafters of the American Law Institute's *A Model Code of Pre-Arraignment Procedure*, *supra* note 15, observed that "a wide variety of experienced persons consider and have considered the pre-trial identification as a crucial factor in the fair and accurate determination of guilt or innocence, and a factor as to which certain kinds of error, once committed, are particularly hard to remedy and particularly likely to lead to unjust results" (p. 422). See generally the views of the commentators referred to in note 24, *infra*.

24. See E. B. Block, *The Vindicators* (New York: Doubleday, 1963); E. M. Borchard, *Convicting the Innocent* (New Haven: Yale University Press, 1932); R. Brandon and C. Davies, *Wrongful Imprisonment: Mistaken Convictions and Their Consequences* (London: Archon Books, 1973); P. Cole and P. Pringle, *Can You Positively Identify This Man?* (London: André Deutsch, 1974); *Devlin Report*, *supra* note 12; J. Frank and B.

Frank, *Not Guilty* (1957; reprint ed., New York: Da Capo Press, 1971); F. Frankfurter, *The Case of Sacco and Vanzetti: A Critical Analysis for Lawyers and Laymen* (Boston: Little, Brown and Co., 1927); E. Gardner, *The Court of Last Resort* (New York: Pocket Books, 1952); *Justice Memorandum*, *supra* note 12; P. Hain, *Mistaken Identity: The Wrong Face of the Law* (London: Quartet Books, 1976); L. Hale, *Hanged in Error* (Baltimore: Penguin Books, 1961); M. Houts, *From Evidence to Proof: A Searching Analysis of Methods to Establish Fact* (Springfield, Illinois: Charles C. Thomas, 1956); National Council of Civil Liberties, *Memorandum of Evidence to the Devlin Committee on Identification Parades and Procedure* (London, 1974), Appendix; F. O'Connor, " 'That's the Man': A Sobering Study of Eyewitness Identification and the Polygraph", 49 *St. John's Law Review* 1 (1974); C. H. Rolph, *Personal Identity* (London: Michael Joseph, 1957); P. M. Wall, *Eye-Witness Identification in Criminal Cases* (Springfield, Illinois: Charles C. Thomas, 1965); M. Walker and B. Brittain, *supra* note 12, [this book, detailing a number of cases of wrongful conviction in England, was published by a group called "Justice Against the Identification Laws"]; B. Wentworth and H. Wilder, *Personal Identification* (Boston: R. G. Badger, 1918); J. H. Wigmore, *The Science of Judicial Proof*, 3rd ed. (Boston: Little, Brown & Co., 1937), pp. 250-254; G. Williams, *The Proof of Guilt: A Study of the English Criminal Trial*, 3rd ed. (London: Stevens and Sons, 1963), pp. 119-120; W. Willis, *An Essay on the Principles of Circumstantial Evidence*, 7th ed. (London: Butterworth & Co., 1937), pp. 192-202.

25. In addition to the studies referred to in the text, see Judge Jerome Frank, who, in a book dealing with miscarriages of justice, stated that "[p]erhaps erroneous identification of the accused constitutes the major cause of the known wrongful convictions". Frank and Frank, *supra* note 24, p. 61. Houts also concludes from his studies that "eyewitness identification is the most unreliable form of evidence and causes more miscarriages of justice than any other method of proof". Houts, *supra* note 24, pp. 10-11.

26. Borchard, *supra* note 24, p. xiii.

27. Brandon and Davies, *supra* note 24, p. 24.

28. The terms of reference for the committee were:

> To review, in the light of the wrongful convictions of Mr. Luke Dougherty and Mr. Laszlo Virag and of other relevant cases, all aspects of the law and procedure relating to evidence of identification in criminal cases; and to make recommendations. (*Devlin Report*, *supra* note 12, p. vii)

29. See M. A. Méndez, " 'Memory, That Strange Deceiver', Book Review of The Psychology of Eyewitness Testimony by A. Daniel Yarmy", 32 *Stanford Law Review* 445 (1980).

30. See O. Hilton, "Handwriting Identification vs. Eyewitness Identification", 45 *Journal of Criminal Law, Criminology and Police Science* 207, at 212 (1954).

31. See S. Paikin, "Identification as a Facet of Criminal Law", 29 *Canadian Bar Review* 372 (1951).

32. See Borchard, *supra* note 24, pp. 1-3.

33. See Rolph, *supra* note 24, p. 81.

34. *R.* v. *Craig* (1933), 49 C.L.R. 429, at 446 (Aust. H.C.). Both Wigmore and Morgan, the outstanding scholars in the area of the law of evidence, have thoroughly analysed the logical processes of testimonial proof. See, in particular, Wigmore, *supra* note 24; E. M. Morgan, "Hearsay Dangers and the Application of the Hearsay Concept", 62 *Harvard Law Review* 177, at 184 (1948).

35. *R.* v. *Browne and Angus* (1951), 11 C.R. 297, 99 C.C.C. 141 at 147, (1951) 1 W.W.R. (N.S.) 449. See also *R.* v. *Harrison (No. 3)* (1951), 12 C.R. 314, 100 C.C.C. 143 at 145, (1951) 2 W.W.R. (N.S.) 318 (B.C. C.A.); *R.* v. *Yates* (1946), 85 C.C.C. 334 (B.C. C.A.); *R.* v. *Smith*, [1952] O.R. 432 at 436, 103 C.C.C. 58 at 61 (Ont. C.A.).

36. For citation to the literature of the various efforts psychologists have made to alert lawyers and judges to the psychological process of testimonial proof, see N. Brooks, "Psychology and the Litigation Process: Rapprochement?" in Law Society of Upper Canada, Department of Continuing Education, *Psychology and the Litigation Process* (Toronto: 1976), pp. 26-29; see also the literature cited in note 37, *infra*.

37. The literature published in the last six years is voluminous. For a review, see B. R. Clifford and R. Bull, *The Psychology of Person Identification* (London: Routledge and Kegan Paul, 1978); F. J. Levine and J. L. Tapp, "The Psychology of Criminal Identification: The Gap From Wade to Kirby", 121 *University of Pennyslvania Law Review* 1079 (1973); E. F. Loftus, *Eyewitness Testimony* (Cambridge, Mass.: Harvard University Press, 1979); F. D. Woocher, "Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification", 29 *Stanford Law Review* 969 (1977); A. D. Yarmey, *The Psychology of Eyewitness Testimony* (New York: Free Press, 1979); Symposium, "Eyewitness Behaviour" in 4 *Law and Human Behavior* (No. 4) 237-394 (1980).

38. Somewhat surprisingly, although the courts have never thoroughly analysed the psychological process of proof, they have been aware that the real danger in eyewitness testimony has been with the honest but mistaken witness. Indeed, in a number of cases, appeal courts have overturned jury verdicts where the trial judge has suggested to the jury that they need only be convinced of the identifying witness's honesty. For example, in a 1947 case from British Columbia, two police officers had identified the accused as the culprit and the trial judge told the jury there was no possibility of the police officers being mistaken in their identification of the accused. He went on to say that "if the defence's statement is true, Detectives McDonald and Pinchin are not honest, but they are perjurers and have come here and deliberately perjured themselves". *R.* v. *McClellan* (1947), 4 C.R. 425 at 426. The British Columbia Court of Appeal ordered a new trial because the jury was misled about the real dangers of eyewitness testimony.

    In a robbery case where the defence was one of mistaken identity, the Ontario Court of Appeal ordered a new trial because the charge given by

the trial judge on the issue of identity was substantially the same as what was then required by section 134 of the *Criminal Code* to be given by trial judges in rape cases. Mr. Justice Jessup stated that in his opinion:

> . . . such a charge is insufficient with respect to an issue of identification by an eyewitness because it tends to caution the jury only on the credibility of the witness and not also on the inherent frailties of identification evidence arising from the psychological fact of the unreliability of human observation and recollection. (*R.* v. *Sutton*, [1970] 2 O.R. 358 at 368)

39. For a review of the literature, see Loftus, *supra* note 37, ch. 5; see also K. H. Marquis, J. Marshall, and S. Oskamp, "Effects of Kind of Question and Atmosphere of Interrogation on Accuracy and Completeness of Testimony", 84 *Harvard Law Review* 1620 (1971).

40. See, for example, A. Doob and H. Kirshenbaum, "Bias in Police Lineups — Partial Remembering", 1 *Journal of Police Science and Administration* 287 (1973).

41. A psychologist, in clarifying the role of applied eyewitness testimony research, has referred to the variables that affect eyewitness accuracy but which cannot be controlled as "estimator" variables, and to those variables that can be controlled in the criminal justice system as "system" variables. G. L. Wells, "Applied Eyewitness-Testimony Research: System Variables and Estimator Variables", 36 *Journal of Personality and Social Psychology* 1546 (1978).

42. A commentator has observed that "[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor — perhaps it is responsible for more such errors than all other factors combined". Wall, *supra* note 24, p. 26; but see Woocher, *supra* note 37, p. 970.

43. R. Buckhout, A. Alper, S. Chern, O. Silverberg and M. Slomovits, "Determinants of Eyewitness Performance on a Lineup", 4 *Bulletin of the Psychonomic Society* 191 (1974) (approximately 40 per cent correct identification); R. Buckout, "Nearly 2000 Witnesses Can Be Wrong", 2 *Social Action and the Law Newsletter* (No. 3) 7 (1975) (In this study a purse-snatching was staged on television. Only 15.3 per cent of the 2,145 viewers who responded to a questionnaire correctly identified the "mugger" from a lineup held subsequently. Simply by guessing the viewers would have selected the "mugger" 14.3 per cent of the time); E. Brown, K. Deffenbacher and W. Sturgill, "Memory for Faces and the Circumstances of Encounter", 62 *Journal of Applied Psychology* 311 (1977) (approximately 50 per cent correct identification); H. R. Dent and F. Gray, "Identification in Parades", 1 *New Behaviour* 366 (1975) (approximately 14 per cent correct identification); see also G. L. Wells, M. R. Leippe and T. M. Ostrom, "Crime Seriousness as a Determinant of Accuracy in Eyewitness Identification", 63 *Journal of Applied Psychology* 345 (1978). Of course these precise accuracy rates are quite meaningless because they reflect the varied conditions under which the studies were done and for many reasons may not be translatable to real-life crime situations. As well, of course, in

real life, false identifications do not pose a threat of wrongful conviction unless the witness chooses the police suspect out of the lineup; if someone else is chosen the police will be aware of the error. See R. C. L. Lindsay and G. L. Wells, "What is an Eyewitness-Identification Error?: The Effect of Lineup Structure Depends on the Definition of a False Identification", unpublished. However, these studies do provide a general indication of the unreliability of eyewitness testimony. It might be the case that in real-life situations, because of the traumatic nature of a real crime and the influences of police investigation, the rate of accuracy is even much lower.

44. Devlin, *supra* note 12, p. 7.

45. *U.S.*v. *Wade*, 388 U.S. 218 (1967).

46. *Id.*, p. 229, quoting G. Williams and H. A. Hammelman, "Identification Parades: Part I", [1963] *Criminal Law Review* 479 at 482.

47. See B. Clifford, "The Relevance of Psychological Investigation to Legal Issues in Testimony and Identification", [1979] *Criminal Law Review* 153.

48. Williams, *supra* note 24, pp. 119-120 ("It would be pleasant, but unduly optimistic, to think that the danger inherent in identification evidence by comparative strangers to the accused is now generally recognized. The fact is that juries do not recognize its unreliable nature..."); see also Frank and Frank, *supra* note 24, pp. 19-23. Borchard, whose observation was based upon his study of sixty-five cases of wrongful conviction, noted that "[j]uries seem disposed more readily to credit the veracity and reliability of the [eyewitness] victims of an outrage than any amount of contrary evidence by or on behalf of the accused, whether by way of alibi character witnesses, or other testimony." Borchard, *supra* note 24, p. xiii.

49. See the survey of prosecuting attorneys in Lavrakas and Bickman, "What Makes a Good Witness?", presented to the American Psychological Association, Chicago, 1975, cited and discussed in Loftus, *supra* note 37, pp. 12-13.

50. *Devlin Report*, *supra* note 12, appendix B.

51. "Reports and Proposals: Identification Issues", 19 *Criminal Law Reporter* (BNA) 2416 (August 18, 1976).

52. See E. Loftus, "Reconstructing Memory: The Incredible Eyewitness", 8 *Psychology Today* (No. 7) December 1974, p. 17, reprinted in 15 *Jurimetrics* 188 at 189 (1975).

53. See, for example, R. C. L. Lindsay, G. L. Wells and C. M. Rumpel, "Can People Detect Eyewitness- Identification Accuracy Within and Across Situations?" 66 *Journal of Applied Psychology* 79 (1981).

54. See G. L. Wells, R. C. L. Lindsay and T. J. Ferguson, "Accuracy, Confidence and Juror Perceptions in Eyewitness Identification", 64 *Journal of Applied Psychology* 440 (1979).

55. See generally A. G. Goldstein, "The Fallibility of the Eyewitness: Psychological Evidence", in B. D. Sales, ed., *Psychology in the Legal Process* (New York: Spectrum, 1977), pp. 223, 225-227.

56. See Brandon and Davies, *supra* note 24, p. 42 ("Most of us, in our everyday lives, when we meet someone, *recognize* him; it is relatively unusual to have to make an identification that does not involve a large area of recognition. Because this generally works in everyday life, we trust it; and this trust is mistakenly extended to areas of identification where it ought not to apply ").

57. See generally, the *Devlin Report*, *supra* note 12; Loftus, *supra* note 37; Woocher, *supra* note 37; D. Starkman, "The Use of Eyewitness Identification Evidence in Criminal Trials", 21 *Criminal Law Quarterly* 361 (1978-79); S. Saltzburg, *American Criminal Procedure: Cases and Commentary* (St. Paul, Minn.: West, 1980), p. 548 and following.

58. The case for detailed and carefully constructed pretrial eyewitness identification procedures was made by one author by stating the following propositions. He stated that if the propositions are accepted, then we must also accept that our system of justice requires "the goverment to use more, rather than less, reliable identification procedures when doing so is neither unduly expensive nor otherwise damaging to legitimate government interests".

    (1) Studies indicate that eyewitness identification presents grave dangers of error.

    (2) Studies indicate that the usual dangers can be exacerbated by suggestive procedures, which may be employed intentionally or unknowingly by law enforcement personnel.

    (3) Once improper suggestion affects a witness, it may be difficult — impossible sometimes — to remove the lingering influence of the suggestion.

    (4) Measures can be taken which would reduce suggestiveness and thereby reduce some of the dangers of misidentification.

    (5) The eyewitness may be unaware of the true dangers of misidentification and overconfident about his or her ability to "finger" the right person.

    (6) Photographic procedures present special problems of reliability because the witness making the identification does not have all the sensory data available at a lineup.

    (7) Police officers often will not be aware of the real dangers of misidentification or the extent to which certain police conduct may contribute to those dangers.

    (8) Jurors may not appreciate the dangers of misidentification or the suggestiveness of certain police procedures.

    (9) Without a videotape reproduction of an identification, reconstructing what happened in an effort to discover whether suggestive procedures were used, and if so to what extent, often may be impossible.

    (10) Once suggestive techniques affect an identification, it is difficult to measure how important the effect is on subsequent identifications.

(11) In many instances, identification procedures can be improved at minimal cost to the government and with no non-pecuniary harm to governmental interests.

(12) Our system of justice rests in large part on the assumption that the innocent should be protected against erroneous convictions, even though protection of the innocent produces acquittals of persons who, in fact, are guilty.

S. A. Saltzburg, *American Criminal Procedure: Cases and Commentary* (St. Paul, Minn.: West, 1980), pp. 544-545.

59. In *The King* v. *Dwyer and Ferguson*, [1925] 2 K.B. 799 at 803, 18 Cr. App. R. 145 at 148, 41 T.L.R. 186 (C.C.A.), a case involving eyewitness identification evidence, the court noted, "it is the duty of the police to behave with exemplary fairness, remembering always that the Crown has no interest in securing a conviction, but has an interest only in securing the conviction of the right person". Of course, the erection of any effective safeguards against the danger of unjust convictions invariably imposes a cost in terms of fewer convictions of the guilty. This fact was openly acknowledged in the *Devlin Report*, *supra* note 12, p. 7:

> . . . the only way of diminishing the risk [of mistaken identification] is by the erection of general safeguards which will inevitably increase the burden of proof ... in the end and overall our recommendations are bound to mean that the benefit of a higher acquittal rate will be bestowed on the guilty as well as on the the innocent. Some of the guilty will be violent criminals.

60. See generally Doob and Kirshenbaum, *supra* note 40.

61. This phenomenon is similar to that found in psychological experiments where experimenters have found that "subjects in experiments seem concerned that their data be useful for the experimenter". (*Id.*, p. 288)

62. In *U.S.* v. *Wade*, *supra* note 45, pp. 230-232, the Supreme Court of the United States noted that:

> The defense can seldom reconstruct the manner and mode of lineup identification for judge or jury at trial. Participants' names are rarely recorded or divulged at trial.... In short, the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification.

63. For example, Rule 9 of *Home Office Circular 109, 1978* provides:

> An officer concerned with the investigation of the case against the suspect shall take no part in the arrangements for or the conduct of the parade, and if present at the parade shall not intervene in any way and should be so positioned that he can at all times be seen by those forming the parade line.

64. This was a recommendation of *Devlin Report*, *supra* note 12, p. 124. In a Canadian case, the judge criticized the officers investigating the crime for taking part in a lineup proceeding to the extent of selecting the individuals who appeared in the lineup with the accused:

Someone with authority, independent I suggest, independent of the investigation then at hand, upon viewing the suspect, ought to determine then and there the requirements of the individuals who shall form the line-up, having regard to the age, build, colour, complexion and dress ... of the accused at that time. Such precautions are essential. (*R.* v. *Opalchuk* (1958), 122 C.C.C. 85 at 94 (Ont. Co. Ct.), per Latchford J.)

65. An Indian court gave the following justification for this procedure:

> This practice is based on sound reason. Magistrates are more conversant with the procedure to be followed to ensure their proper conduct; they can be more relied upon; they are less amenable to extraneous influences; they are more easily available, they can act with great authority over the police and the jail staff who have to arrange for the parade. Experience too is invaluable, and accordingly ... identification proceedings should be conducted by experienced Magistrates and ... they should attend at least six identification parades for instructional purposes before they can hold one unaided. (*Asharfi* v. *State* (1961), 48 A.I.R. (A) 153 at 158)

66. In *Re Kamaraj Goundar* (1960), 47 A.I.R. (M) 125 at 130, the Court remarked that everyone — especially police — should be excluded from identification proceedings.

67. This rationale was given by a court in the following terms:

> The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of the occurence are to identify them from the midst of other persons without any aid from any other source. That is why provisions are made that the police are not to be present at the time of the parade. Identification in the test identification parade loses much value if the Sub-Inspector has been with the identifying witnesses for some time before the parade is held. (*Provash Kumar Bose* v. *The King* (1951), 38 A. I. R. (C) 475 at 477)

68. Accordingly, it was said in *Kartar Singh* v. *The Emperor* (1934), 21 A.I.R. (L) 692 at 693, that

> . . . the presence of the two Head Constables of Police in the room where the identification was held was really most objectionable.
>
> The administration of criminal justice requires that every act done by the agency responsible for the investigation of crime must be fair and upright and free from taint of any sort. The police should inspire confidence in the public....

69. See M. Scaparone, "Police Interrogation in Italy", [1974] *Criminal Law Review* 581. Judicial supervision of identification procedures is also a feature of the Spanish and Mexican Codes of Criminal Procedure. See Murray, *supra* note 14, pp. 625-627.

70. See P. M. Wall, *supra* note 24, p. 46.

71. *Supra* note 15.

72. There is a substantial amount of literature on the advantages of having judicial supervision of interrogation practices. Most of the arguments in

favour of judicial supervision of interrogation would also apply to the judicial supervision of lineups. See Law of Evidence Project, *Compellability of the Accused and the Admissibility of his Statements*, Study Paper No. 5, Ottawa: Law Reform Commission of Canada, 1973, and the literature cited therein.

73. An American case nicely illustrates the kind of suggestion that can, even unintentionally, be made when the officer in charge of the lineup knows the identity of the suspect. In *State* v. *Lewis*, 296 So. 2d 824 (La. Sup. Ct., 1974) the witness picked the "third from right" when the accused was third from her left. The officer then asked the witness if she knew her left from her right. The accused was then identified. Surprisingly, the court did not recognize the impropriety of the officer's conduct.

74. See generally R. Rosenthal, *Experimenter Effects in Behavioral Research* (New York: Appleton-Century-Crofts, 1966).

75. See J. E. Smith, R. J. Pleban and D. R. Shaffer, "Effects of Interrogator Bias and a Police Trait Questionnaire on the Accuracy of Eyewitness Identification", 116 *Journal of Social Psychology* 19 (1982); see generally Doob and Kirshenbaum, *supra* note 40, p. 288; Levine and Tapp, *supra* note 37, p. 1115.

76. See Doob and Kirshenbaum, *supra* note 40, p. 288.

77. The following charge to the jury by a trial judge in New South Wales is typical:

> [I]f the only identification in a case were by a witness who first saw an accused in the dock ... then that would be very dangerous identification and you would certainly, I imagine, not act upon it, because you have the situation of a courtroom, a man charged with the crime, and the witnesses identifying him, being human beings, would very easily say, if he is in the dock and he is charged with it: "I am pretty sure that is the man". (*R.* v. *Chapman* (1969), 91 W.N. (N.S.W.) 61 at 69 (N.S.W. Ct. Cr. App.))

Another Australian trial judge charged a jury in these terms:

> [I]f a man is pointed out to a witness by himself under a light, or still more in the dock ... that in effect is an effort by the police to force him (the witness) into saying "That is the man." That ... is the use of suggestion — "Of course he must be the man, I see him in the dock accused of murder and he must be the man." (*Davies and Cody* v. *The King* (1937), 57 C.L.R. 170 at 179 (Aust. H.C.))

In the same case, the High Court of Australia went on to remark:

> [I]f a witness is shown a single person and he knows that that person is suspected of or charged with the crime, his natural inclination to think that there is probably some reason for the arrest will tend to prevent an independent reliance upon his own recollection when he is asked whether he can identify him. This tendency will be greatly increased if he is shown the person actually in the dock charged with the very crime in question. (p. 182)

78. See *R.* v. *Browne and Angus*, *supra* note 35, p. 149 ("This is a type of identification described as wrong and prejudicial to the accused"); *R.* v. *McGeachy*, [1969] 2 C.C.C. 98 at 105 (B.C. C.A.) ("The significant thing was that the usual line-up ... was, for some unexplained reason, not held. It was of dominant importance that it should have been held"); *R.* v. *Howick*, [1970] *Criminal Law Review* 403 (C.C.A.) ("it is usually unfair to ask a witness to make an identification for the first time in court"); *R.* v. *Glass*, 64 N.Z.L.R. 496, [1945] N.Z. L.R. 249 (N.Z. C.A.); *R.* v. *John*, [1973] *Criminal Law Review* 113 (C.C.A.); *R.* v. *Gaunt*, [1964] N.S.W.R. 864 (N.S.W. Ct. Cr. Appr.); *R.* v. *Maarroui*, 92 W.N. (N.S.W.) 757, [1970] 3 N.S.W.R. 116 (N.S.W. Ct. Cr. App.).

79. In *R.* v. *Gaunt*, *supra* note 78, p. 866, two of the three witnesses identified the appellant in the company of police officers. The other witness identified the appellant at trial. The Court of Appeal noted: "The learned chairman directed the jury 'the main point is one of identification, the only question is whether they [the three witnesses] could posibly be mistaken,' but this, we think, was not sufficient to bring to their minds an adequate note of warning." A new trial was ordered in this case even though there was other Crown evidence. *R.* v. *Howick*, *supra* note 78 and *R.* v. *Maarroui*, *supra* note 78, are other cases in which convictions were quashed because the respective trial judges failed to point out the possibility of error attaching to this type of identification evidence.

80. In *R.* v. *Browne and Angus*, *supra* note 35, p. 150, the issue of a warning was not discussed, but, although other circumstantial evidence also pointed to the two accused, the convictions were quashed. O'Halloran J.A. stated:

> In my judgment, with deference, identification of the kind presented in this case, (a dock identification), is valueless in the sense that it is dangerous for a Court to act upon it in any respect. Its inherent tendencies toward honest mistake and self-deception are so pervasive that they destroy any value that could otherwise attach to it even in a lesser role of "some evidence." The strange failure to hold a line-up in this case invites criticism in more pointed language than I have used.

In *R.* v. *McGeachy*, *supra* note 78, pp. 113-114, it is not clear that a warning had been given. In this case the witness's pretrial evidence was ambivalent; it was not until trial that she was able to give any kind of positive identification, and even then the "dock" identification was made with some reservations. The conviction was quashed because the identificaton evidence "was of such a dubious character and lacked that degree of certainty which the law requires in order to convict".

81. In a Nova Scotia case the accused's request that he be allowed to sit in the body of the court because of the importance of the identification issue was refused on the ground that the right to compel the accused's appearance for trial included requiring him to identify himself in open court: *Re Conrad and the Queen* (1973), 12 C.C.C. (2d) 405 (N.S. S.C.). Similarly, in a case before the Ontario High Court of Justice, it was held that there had been no denial of natural justice nor of the accused's right to a full answer and defence where the Justice had excluded the public from a preliminary inquiry on a charge of rape, at the Crown's request, including friends of the

accused who had come dressed like him in order to test the victim's ability to identify the accused: *Re Regina and Grant* (1973), 13 C.C.C. (2d) 495. Both of these decisions were referred to in *Dubois* v. *The Queen* (1975), 29 C.R.N.S. 220 (B.C. S.C.) where McKay J. concluded that whether an accused should be permitted to sit in the public section of the courtroom where identification is at issue is a matter within the presiding judge's discretion. The refusal of such a request is not a denial of natural justice. However, McKay J. did point out that this form of in-court identification is used regularly.

82. For example, in *R.* v. *Keane* (1977), 65 Cr. App. R. 247 (C.C.A.), a conviction was quashed in part because no proper identification parade had been held (instead, the police had held a confrontation at the station) even though the victim "claimed to recognise the appellant as one whom he knew well by sight on the streets where they lived" (p. 249). The court noted that the victim had earlier mistakenly identified the accused's fraternal twin brother at their home.

83. For example, in *R.* v. *Mackenzie* (1979), 65 A.P.R. 363 (P.E.I. S.C.), the eyewitness claimed a previous "acquaintance" with the accused and his dock identification was accepted without comment.

84. In *R.* v. *Ayles* (1956), 119 C.C.C. 38 (N.B. C.A.), in which the witness identified the suspect as being an ex-patient of the Saint John's Tuberculosis Hospital and known to him, the judge in commenting on an improperly conducted pretrial identification procedure said:

> In my view the showing of photographs to Cunningham had no effect upon his evidence being solely for the purpose of ascertaining the name of the intruder.... He was definite in his assertion that he immediately recognized the intruder as an ex-patient known to him. (p. 52)

85. The following passage in *R.* v. *Smierciak*, [1947] 2 D.L.R. 156 at 157, [1946] O.W.N. 871 at 872, 2 C.R. 434 at 436, 87 C.C.C. 175 at 177 (Ont. C.A.) is typical of the comment that is frequently made by judges in emphasizing the importance of pretrial identification procedures when the witness has never seen the offender prior to the incident in question:

> If a witness has no previous knowledge of the accused person, so as to make him familiar with that person's appearance, the greatest care ought to be used to ensure the absolute independence and freedom of judgment of the witness.

86. See *R.* v. *Yates* (1946), 1 C.R. 237 at 247, [1946] 2 D.L.R. 521 at 530, [1946] 1 W.W.R. 449 at 459, 62 B.C.R. 307, 85 C.C.C. 334 at 345 (B.C. C.A.).

87. For example, in *R.* v. *Robertson* (1979), 45 A.P.R. 529 at 532-533 (N.S. C.A.), the trial judge was quoted as cautioning the jury that "we can make mistakes even with acquaintances. People that we know reasonably well, we can be a little uncertain on occasion where another individual closely resembles them is or is not the person that we know."

88. In *R.* v. *Turnbull*, [1977] Q.B. 224 at 228, [1976] 3 W.L.R. 445 at 447, [1976] 3 A11 E.R. 549 at 552, 63 Cr. App. R. 132 at 137 (C.C.A.), the leading case laying down the mandatory rule of caution, the court stated:

Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

In *Sutton* v. *The Queen*, [1978] W. Aust. R. 94 (W. Aust. S.C.) the witness "testified that she saw three men fleeing from the scene, one of whom she recognized as a man named 'Mole', whom she subsequently identified as the appellant at a police identification parade" (p. 94). The conviction was quashed because the warning given at trial did not meet the standard laid down in *R.* v. *Turnbull*.

89. In two Canadian cases, robbery victims later identified people in bars as their assailants. The police arrived and questioned the suspects in the presence of the victims: *R.* v. *Smith*, [1952] O.R. 432, 14 C.R. 304, 103 C.C.C. 58 (Ont. C.A.); and *R.* v. *Babb* (1972), 17 C.R.N.S. 366, [1972] 1 W.W.R. 705, (B.C. C.A.). There was no need for any formal pretrial identification proceedings in these cases, and none were carried out (although in the latter case the police showed the witness a single photograph of the accused, prior to trial, and were criticized by the court for doing so).

90. See *infra* note 426.

91. [1977] R. de J. 134 (Que. Ct. of Sess.). See also *R.* v. *Yates*, *supra* note 86; *R.* v. *Cleal* (1941), 28 Cr. App. R. 95 (C.C.A.); *R.* v. *Chapman*, *supra* note 77.

92. *R.* v. *Racine*, [1977] R. de J. 134 at 135 (Que. Ct. of Sess.).

93. *Raspor* v. *The Queen* (1958), 99 C.L.R. 346, 32 Aust. L.J.R. 190 (Aust. H.C.).

94. *Id.*, p. 349 (C.L.R.).

95. See *supra* note 10.

96. S. E. Asch, "Effects of Group Pressure upon the Modification and Distortion of Judgment", in E. Maccoby, T. M. Newcomb and E. Hartley, eds., *Readings in Social Psychology*, 3rd ed. (New York: Holt, 1958), p. 393; S. E. Asch, "Opinions and Social Pressure", [1955] *Scientific American* (No. 5) 193.

97. This was the procedure followed in *R.* v. *Harrison (No. 3)*, *supra* note 35. The British Columbia Court of Appeal did not comment on the propriety of the practice.

98. For example, in *R.* v. *Dickman* (1910), 5 Cr. App. R. 135, 26 T.L.R. 640 (C.C.A.), two witnesses were instructed to look through an open door at two persons in a room at the police station. The witnesses then discussed one of the occupant's appearance over tea before viewing the lineup. Although at this time they decided that the person seen was not the killer, at the lineup they identified him. The appeal in this case was dismissed and, while the court criticized the suggestive procedure utilized, no comment was made about the propriety generally of allowing witnesses to view the suspect together and discuss the matter between themselves.

99. (1959), 29 W.W.R. 141, 31 C.R. 127, 125 C.C.C 56 (B.C. C.A.). Another case in which it was suggested that it was improper for witnesses to view photographs together is *R.* v. *Opalchuk*, *supra* note 64, p. 94. In that case it appears that the witnesses were permitted to examine photographs together prior to the arrest of the suspect. The conviction was quashed and the judge noted "the glaring errors in the conduct of the line-up and the use, the improper use, I suggest, of pictures before the line-up together with the evidence as given by Le Bouef and Potter about reviewing the sixteen pictures together in the back of the police cruiser".

100. *Id.*, pp. 143-144 (W.W.R.), 130 (C.R.), 60 (C.C.C.). The court went on to point out that the course followed in this case was all the more objectionable since one of the witnesses was an adult and the other two were young boys who would be particularly vulnerable to suggestion. The conviction in this case was, however, upheld on appeal, since the appellate court felt that "the opportunity of each of the three witnesses to observe the men who committed the robbery ... together with the very definite and emphatic character of the evidence given ... justified the Magistrate in convicting" (p. 142 (W.W.R.), 129 (C.R.), 58 (C.C.C.)).

101. See A. Alper, "Eyewitness Identification: Accuracy of Individual vs. Composite Recollections of a Crime", 8 *Bulletin of the Psychonomic Society* 147 (1976); A. H. Rupp, *Making the Blind See: Effects of Discussion on Eyewitness Reports*, Rep. No. CR-19 (1975), Center for Responsive Psychology; E. F. Loftus and Greene, "Warning: Even Memory for Faces May Be Contagious", 4 *Law and Human Behavior* 323 (1980); O. H. Warnick and G. S. Sanders, "The Effects of Group Discussion on Eyewitness Accuracy", 10 *Journal of Applied Social Psychology* 249 (1980) (group discussion increased the overall accuracy of individual eyewitness reconstruction).

102. Alper, *supra* note 101.

103. In *R.* v. *Dickman*, *supra* note 98, for instance, the witnesses agreed over tea that a person they had seen in the police station was not the offender; they then went to the lineup and pointed the same man out. In *R.* v. *Opalchuk*, *supra* note 64, one witness, after making her selection of a photograph, communicated this to another witness who had not yet chosen a photograph. In *R.* v. *Maarroui*, *supra* note 78, one eyewitness pointed out the suspect to another, and in *R.* v. *Gilling*, (1916), 12 Cr. App. R. 131 (C.C.A.), there was evidence that the eyewitness had discussed the accused's personal appearance after having seen the suspect. In all of these cases the courts failed to comment on both the desirability and the effect that these incidents had on the weight of the identification evidence.

104. *R.* v. *W.*, [1947] 2 S.A.L.R. 708 (So. Africa S.C., App. Div.).

105. *Id.*, p. 713.

106. *R.* v. *Nara Sammy*, [1956] 4 S.A.L.R. 629 (So. Africa S.C., Transvaal Prov. Div.).

107. *Id.*, p. 631. In *R.* v. *Y. and Another*, [1959] 2 S.A.L.R. 116 (So. Africa S.C., Witwatersrand Local Div.), one witness's identification of the

accused was completely disregarded because the complainant's husband was also present at the lineup and told her "that he (pointing to the suspect) was one of the persons who outraged her" (p. 118). The court went on to give a detailed criticism of the procedures adopted in the case:

> [A]lthough it might not be an irregularity, it is a matter for comment that as in the present case the three Crown witnesses were detained together in a room before the parade and of course strong grounds for criticism emerge on this portion of the case. I do not wish to cast any criticism upon the investigating officer because he has not been able to give evidence but it seems very clear that no one of the safeguards which are referred to in one of these decided cases namely *inter alia* a warning that they should not discuss the question of identification at all was prescribed. (p. 119)

108. *Italian Code of Criminal Procedure*, art. 362, as described by Murray, *supra* note 14, p. 625.

109. *Supra* note 64.

110. *Id.*, p. 93.

111. *Id.*, p. 94. See also *R.* v. *Dickman*, *supra* note 98, p. 143 (Cr. App. R.), p. 642 (T.L.R.), in which the court said:

> The police ought not, either directly or indirectly, to do anything which might prevent the identification from being absolutely independent, and they should be most scrupulous in seeing that it was so.

112. (1910), 5 Cr. App. R. 270 (C.C.A.).

113. *Id.*, p. 273. The conviction was quashed in the case, although the court implied that if a warning had been given to the jury it might have upheld the conviction.

114. *U.S.* v. *Person*, 478 F.2d 659 (1973).

115. *Id.*, p. 661.

116. See generally R. S. Malpass and P. G. Devine, "Eyewitness Identification: Lineup Instructions and the Absence of the Offender", 66 *Journal of Applied Psychology* 482 (1981).

117. See, for example, R. F. Garton and L. R. Allen, "Recognition Memory of Paced and Unpaced Decision-Time for Rare and Common Verbal Material", 35 *Perceptual and Motor Skills* 548 (1972).

118. See R. S. Malpass and P. G. Devine, "Guided Memory in Eyewitness Identification Lineups", 66 *Journal of Applied Psychology* 343 at 349 (1981) ("Providing an opportunity for eyewitnesses to rehearse extensively their recollections of a witnessed offense increased their accuracy in identifying the offender after a substantial interval, without increasing identification errors ").

119. See the articles referred to in note 57, *supra*.

120. But see Egan and Smith, "Improving Eyewitness Identification: An

Experimental Analysis", a paper presented at the American Law Society Convention, Baltimore, October, 1979.

121. In a number of cases, judges have recognized the danger that witnesses will be anxious to make an identification. Thus, the Supreme Court of South Africa suggested that a witness "might think it is his duty to point out somebody, and an act of disrespect to or criticism of the police if he is not able to do so". *Supra* note 106, pp. 631-632. Another judge of the South African Supreme Court referred to the fact that victims of crimes may make lineup identifications in order to satisfy their wish that somebody be made to pay for their sufferings, as stemming from the "innate and instinctive desire that there shall be retribution": *R.* v. *Masemang* [1950], 2 S.A.L.R. 488 at 493 (So. Africa S.C., App. Div.)

The Devlin Committee compiled some statistics that it suggested indicates that witnesses do not feel under great pressure to pick someone out. Their statistics revealed that in only about one-half of all lineups did witnesses make an identification. Out of a total of 2,116 parades, no one was picked out in 984 instances (Appendix B, p. 163). Admittedly, this might be taken as an indication that the problem may not be so severe as some commentators suggest, and while it is encouraging that a large number of people do not submit to pressures to make identifications at lineups, it should not be concluded that people never, or only seldom, pick out innocent suspects because they consider it their public duty to do everything possible to assist the police. Furthermore, in most Canadian cities, as our survey revealed, witnesses fail to pick someone as the person they saw in a much smaller number of cases. The following approximate percentages were given by police officers in response to the question, "How often are lineups held and no one is identified?": Toronto — 10 per cent; Kingston — 50 per cent; Regina — 25 per cent; Halifax — 40 per cent; Fredericton — 20 per cent; Vancouver — 16 per cent; Calgary — 10 per cent; Montréal — 50 per cent; Sherbrooke — 10 per cent.

122. R. Buckhout, "Determinants of Eyewitness Performance in a Lineup", Report No. CR-9 (New York: Center for Responsive Psychology, 1974). Similarly in another study, one group of witnesses was told that the offender was in the lineup while another group was told that he may or may not be in the lineup (in fact, the offender was present in one-half of the lineups viewed by each group). Subjects who had been given the high expectancy instruction were significantly more likely to mistakenly identify a person from a lineup that did not contain the offender: D. F. Hall and T. M. Ostrom, "Accuracy of Eyewitness Identification after Biasing and Unbiasing Instructions", paper presented at the annual meeting of the American Psychological Association, 1975.

123. In 1979, Jane Blouin, then a doctoral student in psychology at Carleton University, assisted the Law Reform Commission of Canada in running a series of empirical studies in order to test some of the assumptions underlying present practices relating to pretrial identification procedures. Questions such as the following were tested: the effect of pre-lineup questionnaire procedures on the witness's ability to identify a suspect, the importance of context on a witness's ability to identify a suspect, the

relative merits of six-person vs. twelve-person lineups, the effectiveness of mugshot presentations vs. live lineups, and the effect of various pre-lineup instructions on an eyewitness. A paper describing these experiments and the results was prepared by Jane Blouin, "Four Experimental Studies on Procedural Influences on Eyewitness Identification Accuracy." The paper is on file at the Commission.

124. For a further study which tends to show that if witnesses know that the police are parading someone they have reason to suspect, the witnesses will feel social pressure to make an identification, thus lowering their criteria for identification, see A. Upmeyer and W. K. Schreiber, "Effects of Agreement and Disagreement in Groups on Recognition Memory Performance and Confidence", 2 *European Journal of Social Psychology* 109 (1972).

125. See *U.S.* v. *Person*, *supra* note 114, p. 661 ("[T]he mere fact that suspects are included within the line-up, and that witnesses know or assume this to be the case, is an inescapable aspect of line-up identification procedure"). The danger that witnesses might be under some presure to select the person who "looks most like" the person they saw is illustrated in *R.* v. *Ross*, [1960] *Criminal Law Review* 127 (C.C.A.), where the eyewitness admitted during cross-examination: "Well, I expected the man to be there on the identification parade and I picked out the man who looked most like the man who had engaged me."

126. *R.* v. *Rosen* (1969), 90 W.N. (N.S.W.) 620 (N.S.W. Ct. Cr. App.).

127. *Id.*, p. 622.

128. See, *supra* note 99, p. 142 (W.W.R.), 128 (C.R.), 58 (C.C.C.). See also *R.* v. *Masemang*, *supra* note 121.

129. *Supra* note 106.

130. *Id.*, p. 631.

131. H. D. Ellis, G. M. Davies and J. W. Shepherd, "Experimental Studies of Face Identification", 3 *Journal of Criminal Defence* 219 at 230 (1977). See also studies cited in note 208, *infra*.

132. *Devlin Report*, *supra* note 12, p. 120.

133. *Id.*, p. 121.

134. See G. L. Wells, T. J. Ferguson and R. C. L. Lindsay, "The Tractability of Eyewitness Confidence and Its Implications for Triers of Fact", 66 *Journal of Applied Psychology* 688 (1981) (finding that the inflation of confidence may be greater for inaccurate witnesses than for accurate witnesses).

135. The studies are reviewed in K. A. Deffenbacher, "Eyewitness Accuracy and Confidence: Can We Infer Anything about Their Relationship?", *Law and Human Behavior* 243 (1980); and M. R. Leippe, "Effects of Integrative Memorial and Cognitive Processes on the Correspondence of Eyewitness Accuracy and Confidence", 4 *Law and Human Behavior* 261 (1980).

136. See E. F. Loftus, D. G. Miller and H. J. Burns, "Semantic Integration of

Verbal Information into a Visual Memory", 4 *Journal of Experimental Psychology: Human Learning and Memory* 19 (1978).

137. Deffenbacher, *supra* note 135.

138. *R.* v. *Spatola*, [1970] 3 O.R. 74 at 82, 10 C.R.N.S. 143 at 152, [1970] 4 C.C.C. 241 at 249 (Ont. C.A.).

139. See for instance, *R.* v. *Sutton*, *supra* note 38:

> [W]hen the third photograph was shown she made a tentative identification. What she then said, in any event, was "this looks like the man that robbed me" and "If this fella had blue eyes and a beard ...".
>
> [A]fter again viewing the accused through the door, Miss Brennan said "I'm almost positive that is him but I don't want to swear to it, I don't want to make a mistake".
>
> The next day Miss Brennan asserted to the police that her identification of the appellant as the robber was certain .... (p. 360)

140. In *R.* v. *Cleal* (1941), 28 Cr. App. R. 95 (C.C.A.) a court of appeal quashed a conviction because a child victim expressed uncertainty in his identification and his testimony was uncorroborated, the court of appeal noted that: "When the boy was asked as a last question in cross-examination: "Do you think you may have made a mistake about this man and it may have been another man?", he answered: "Yes, Sir, I might" (p. 101). Similarly, the Nova Scotia Court of Appeal, in quashing a conviction in *R.* v. *Rehberg* (1973), 5 N.S.R. (2d) 14, noted: "Where the one witness who had contact with the person who sold him the stolen articles, states, under oath, that it could have been someone other than the accused, then it is difficult to see how identity can be properly established ...". (p. 16)

In both of these cases there was no opportunity for the witness to express uncertainty at an earlier point since no pretrial identification procedures had been held. Other cases where the witness's expressed uncertainty quite likely influenced the court in quashing the conviction are: *R.* v. *Opalchuk*, *supra* note 64, *R.* v. *Sutton*, *supra* note 38, *R.* v. *Hederson*, [1944] 2 D.L.R. 440; *R.* v. *Hayduk*, 81 C.C.C. 132 (Ont. CA.), [1935] 4 D.L.R. 419, [1935] 2 W.W.R. 513, 64 C.C.C. 194, 43 Man. R. 209 (Man. C.A.); *McGeachy*, *supra* note 78; *R.* v. *Ross*, *supra* note 125.

141. See *R.* v. *Newell* (1927), 27 S.R. (N.S.W.) 274 at 275 ("Some people, as we know, habitually express themselves with a greater degree of caution then others. It is very largely a question of temperament ").

142. In *R.* v. *Harvey* (1918), 42 O.L.R. 187, the witness at trial was unable to make a positive identification and it appears that no pretrial identification had been made. The witness stated at trial: "To the best of my knowledge, he was the man.... There is another man here to-day, and I am undecided which it is ... I am not certain ... I don't want to make any mistake" (pp. 188-189). The court of appeal, however, stated that this was sufficient evidence of identification to go to the jury and it could not be said that there was "no evidence" upon which a conviction could rest. For other cases where the defence unsuccessfully argued that the witness's reserva-

tions about the identification fatally weakened the case against the accused, see *R.* v. *Nepton* (1971), 15 C.R.N.S. 145 (Que. C.A.); *R.* v. *Richards*, [1964] 2 C.C.C. 19 (B.C. C.A.).

In *R.* v. *Maynard* (1979), 69 Cr. App. R. 309 (C.C.A.), defence counsel made the interesting argument that the fact that the eyewitness had not wavered in her identification of the accused was an indication that it was unreliable. He argued that "[A]dherence to a possibly mistaken identification ... [is] one of the characteristics of the honest but unreliable witness" (p. 315). The court did not disagree with this submission but declined to apply it as a blanket principle. The court stated: "In theory, of course, this is possible, but there can be no certain generalisation in these matters ..." (p. 315).

143. See studies cited *infra*, note 189.

144. *Supra* note 89.

145. *Id.*, p. 61 (C.C.C.), 436 (O.R.), 307 (C.R.). Also in *R.* v. *Browne and Angus*, *supra* note 35, p. 302 (C.R.), 147 (C.C.C.), 455 (W.W.R.(N.S.)). O'Halloran J.A. noted:

> Unless the witness is able to testify with confidence what characteristics and what "something" has stirred and clarified his memory or recognition, then an identification confined to "that is the man", standing by itself, cannot be more than a vague general description and is untrustworthy in any sphere of life where certitude is essential.

146. See *Home Office Circular 109, 1978*, *supra* note 12.

147. On the probative value of non-identifications, see generally G. L. Wells and R. C. L. Lindsay, "On Estimating the Diagnosticity of Eyewitness Nonidentification", 88 *Psychological Bulletin* 776 (1980).

148. (1954), 110 C.C.C. 382, [1955] O.W.N. 90, 20 C.R. 137 (Ont. H.C.).

149. See *R.* v. *Dunlop, Douglas and Sylvester* (1976), 33 C.C.C. (2d) 342 at 347 (Man. C.A.); *R.* v. *Demich* (1951), 102 C.C.C. 218 (B.C. C.A.); *R.* v. *Harrison (No. 3)*, *supra* note 35; *R.* v. *Hederson*, *supra* note 140; *R.* v. *McDonald* (1951), 13 C.R. 349, 4 W.W.R. (N.S.) 14, 101 C.C.C. 78 (B.C. C.A.); *R.* v. *Dixon* (1953), 8 W.W.R. (N.S.) 88, 16 C.R. 108, 105 C.C.C. 16 (B.C. C.A.); *R.* v. *Chadwick, Matthews and Johnson* (1917), 12 Cr. App. R. 247 (C.C.A.), *R.* v. *Wainwright* (1925), 19 Cr. App. R. 52 (C.C.A.); *R.* v. *Osborne and Virtue*, [1973] 1 All E.R. 649 at 653, [1973] 1 Q.B. 678, [1973] 2 W.L.R. 209, [1973] *Criminal Law Review* 178, 57 Cr. App. R. 297 (C.C.A.).

150. See D. G. Miller and E. F. Loftus, "Influencing Memory for People and Their Actions", 7 *Bulletin of the Psychonomic Society* 9 (1976); E. F. Loftus "Unconscious Transference in Eyewitness Identifications", 2 *Law and Psychology Review* 93 (1976).

151. Brown, Deffenbacher and Sturgill, *supra* note 43; G. W. Gorenstein and P. C. Ellsworth, "Effect of Choosing an Incorrect Photograph on a Later Identification by an Eyewitness", 65 *Journal of Applied Psychology* 616 (1980); G. Davies, J. Shepherd and H. Ellis, "Effects of Interpolated

Mugshot Exposure on Accuracy of Eyewitness Identification", 64 *Journal of Applied Psychology* 232 (1979).

152. For example, in *R.* v. *Goode*, [1970] S.A.S.R. 69, the Supreme Court of South Australia, in allowing the accused's appeal from conviction for armed robbery, noted that the only identifying witness had picked the accused's photograph from a group of eighteen, but commented that "[t]here was no evidence as to how far, if at all, the originals of the other seventeen photographs resembled the applicant" (p. 70). In *R.* v. *Simpson and Kenney*, [1959] O.R. 497, 30 C.R. 323, 124 C.C.C. 129 (Ont. C.A.), the dissent felt that the appeal from conviction should have been allowed. This opinion was based in part upon the weakness of the identification evidence and the fact that a crucial discrepancy could not be cleared up, since there was no record of the identification procedure:

> A detective of police swore that he had shown Mr. Spackman six photographs of different persons, including one of the appellants, Simpson, before he was called to identify that appellant at the trial, but Mr. Spackman said he had been shown but one photograph — that of Simpson, a front and side view. Who was right? (p. 134 (C.C.C.), 502 (O.R.), 328 (C.R.))

153. In *R.* v. *Prentice*, [1965] 4 C.C.C. 118, 52 W.W.R. 126 for example, the British Columbia Court of Appeal, in dismissing an appeal from conviction, appeared not to grasp the significance of the problem:

> The witnesses Stuart and Micner were shown a number of pictures prior to the trial and both identified the picture of the accused from among these pictures. The pictures of the persons other than the accused were not produced at the trial, and the accused now complains that he suffered prejudice because of this. I cannot agree.
>
> The Magistrate, by his reasons for judgment, has demonstrated that he was aware of the danger occasioned by witnesses identifying a photograph prior to a trial and being influenced by his memory of the photograph more than by his remembrance of what he actually saw at the scene. The identification cannot be impeached upon this ground, as the Magistrate has instructed himself correctly. (p. 119 (C.C.C.), 127-128 (W.W.R.))

What the court failed to appreciate was that the Magistrate could not possibly determine what prejudice the accused might have suffered without first comparing his appearance to that of the persons depicted in the other photographs.

154. (1976), 16 N.S.R. (2d) 271 (N.S. S.C.).

155. *Id.*, pp. 299, 305.

156. Compare *R.* v. *Christie*, [1914] A.C. 545, 83 L.J.K.B. 1907, with *R.* v. *Harrison*, [1946] 3 D.L.R. 690, 86 C.C.C. 166 (B.C. C.A.).

157. *R.* v. *Evensen* (1916), 33 W.N. 106 (C.C.A.); *R.* v. *Eden*, [1970] 2 O.R. 161, [1970] 3 C.C.C. 28 (Ont. C.A.).

158. See *R.* v. *Cleal*, *supra* note 140, p. 96 (The accused's statement, "I have

never seen the boy before", made when confronted with the victim, was put into evidence).

159. See, *supra* note 148.

160. The Australian Law Reform Commission in its *Criminal Investigation Report No. 2* (Interim Report — September 5, 1975) concluded that counsel should be entitled to be present "to give advice to his client prior to the commencement of a parade, and to act as a source of general reassurance to him during it if the client requires it".

161. *Home Office Circular 109, 1978*, rule 2.

162. *Code de Procédure Pénale*, (1959), p. 118.

163. D. Poncet, *La protection de l'accusé par la Convention Européene des Droits de l'Homme: Étude de droit comparé* (Genève: Librairie de l'Université-Georg & Cie S.A., 1977), p. 164.

164. *German Code of Criminal Procedure* (English version) (London: Sweet and Maxwell Ltd., 1965), p. 79.

165. See Murray, *supra* note 14, p. 625.

166. See Rule 504 and commentary.

167. The question was discussed, however, in an Indian case:

> Since justice must not only be done but must be seen to be done, the accused must be afforded reasonable opportunity not only to safeguard his interest but to satisfy himself that the proceedings are conducted fairly and honestly. Hence if he requests for the presence of his counsel at the test identification, his request should never be turned down, though of course the counsel is not entitled to take any part in the actual holding of the test. Similarly the prosecution too have a right to be represented by counsel if they wish to do so. (*Asharfi* v. *State*, *supra* note 65, p. 168)

168. See for example Read, *supra* note 13; Comment, "Lawyers and Lineups", 77 *Yale Law Journal* 390 (1967); N. R. Sobel, "Assailing the Impermissible Suggestion: Evolving Limitations on the Abuse of Pre-Trial Criminal Identification Methods", 38 *Brooklyn Law Review* 261 (1971); Comment, "The Right to Counsel at Lineups: Wade and Gilbert in the Lower Courts", 36 *University of Chicago Law Review* 830 (1969); Comment, "Right to Counsel at Police Identification Proceedings: A Problem in Effective Implementation of an Expanding Constitution", 29 *University of Pittsburgh Law Review* 65 (1967); J. D. Grano, "Kirby, Biggers and Ash: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?" 72 *Michigan Law Review* 719 (1974); Note, "Criminal Procedure — Due Process — Right to Counsel at Pre-trial Identification", 78 *West Virginia Law Review* 84 (1975); Woocher, *supra* note 37.

169. See *supra* note 45.

170. *Id.*, pp. 226-227.

171. *Id.*, pp. 235, 236-237.

172. *Id.*, p. 241.

173. 388 U.S. 263 (1967).

174. *Id.*, p. 273.

175. 388 U.S. 293 (1967).

176. 406 U.S. 682 (1972).

177. C. A. Pulaski, "Neil v. Biggers: The Supreme Court Dismantles the Wade Trilogy's Due Process Protection", 26 *Stanford Law Review* 1097 at 1103 (1974).

178. 413 U.S. 300 (1973).

179. 409 U.S. 188 (1972). This decision, although it concerned a case that had arisen before the *Wade* trilogy, has been held applicable to post-*Wade* cases. See *Manson* v. *Braithwaite*, 432 U.S. 98 (1977), where a show-up identification used by the police seven months after the assault, instead of a lineup, was found to be admissible evidence.

180. If duty counsel is not available, legal aid will have to provide a lawyer.

181. The Devlin Committee had this to say in its *Report*:

> We consider it desirable that a suspect should always have a solicitor representing him at a parade, but the evidence we have had about the fair way in which parades are conducted by the police and the lack of complaint about them does not lead us to conclude that it is an absolute necessity. (p. 115)

182. See *supra* note 15, p. 433.

183. A survey of the reported cases indicates that the courts consider one of the most effective means of disclosing the possibility that witnesses are mistaken in their identification of the accused is to point to discrepancies between their description of the offender and the actual appearance of the accused. The cases are legion. However, citation to a few will illustrate the weight that the courts give to this information: In *R.* v. *Peterkin* (1959), 30 C.R. 382 (Que. Ct. of Sess.), the witness asserted that the offender had a trench coat thrown over his right arm to conceal a weapon he was carrying, but the accused testified that he was left-handed. He was acquitted at trial before the Quebec Court of Sessions. In *R.* v. *Aiken*, [1925] V.L.R. 265, the Supreme Court of Victoria noted that the witness had given a description to the police in which he described the man who stole a motorcycle as about 5'10" whereas the accused was only 5'5½". In *R.* v. *Craig*, *supra* note 34, a judge of the High Court of Australia pointed out in his dissenting judgment that one of the identifying witnesses described the murderer as having "fairly broad Irish features" but, he remarked, "to such description, Craig would appear not to answer" (p. 448). In yet another example, both witnesses in a case involving forgery stated that the culprit was clean-shaven. The accused offered evidence proving that he had a mustache at the time of the offence: *R.* v. *Gilling*, *supra* note 103. In *R.* v. *Schrager* (1911), 6 Cr. App. p. 253 (C.C.A.), both witnesses to an assault said that the assailant was wearing light clothes. They both

identified the accused who was found sitting in a cab near the scene of the assault. However, the accused was wearing dark clothes. It was suggested that he had changed, but as no other clothes were found, the Court of Criminal Appeal quashed his conviction.

In *Chartier* v. *Attorney General of Quebec* (1979), 9 C.R. 97 (3d) (S.C.C.) the appellant argued that his arrest was wrongful because his features did not exactly match those described by all of the witnesses. The court commented, "[r]egardless of the number of similar characteristics, if there is one dissimilar feature there is no identification" (p. 138).

Finally, in one case, all four witnesses said the robber was about 5'6" or 5'7" in height. The accused's height was 5'11½". O'Halloran J.A. of the British Columbia Court of Appeal stated:

> If the robber had been 5 feet, 11½ to 6 feet tall, it would have been plainly noticeable. For all four witnesses to make an error of four or five inches in height would be an extraordinary coincidence.... Each witness had ample opportunity to compare the robber's height with his or her own height. This unanimous evidence of the robber's height discloses too great a difference with appellant's actual height to permit appellant being mistaken for the robber, *even if appellant had been found to resemble the robber in all other respects*. (*R.* v. *Harrison (No. 3)*, *supra* note 35, p. 319 (C.R.), 322-323 (W.W.R.), 147 (C.C.C.) — Emphasis added)

184. For example, in a case heard by the British Columbia Court of Appeal, the victim of an assault committed in a pickup truck failed to mention the colour of the truck. The accused's truck was of a very distinctive colour and the court considered the witness's failure to mention this fact in quashing the accused's conviction: *R.* v. *Gagnon* (1958), 122 C.C.C. 301 (B.C. C.A.). However, in many cases the courts do not appear to place much weight on the witness's failure to mention the suspect's distinguishing characteristics in their description. For example, in *R.* v. *Dixon*, *supra* note 149, the poor state of the accused's teeth was very noticeable at trial, and yet, although the court noted that the witness had not described or noted the condition of the suspect's teeth, the court placed little weight on this omission and dismissed the accused's appeal from conviction. In a Nova Scotia case, the Court of Appeal dismissed the accused's appeal with little apparent concern for the fact that the witness purported to identify the accused in a lineup on the basis of a prominent "hickey" on the accused's neck, even though he had failed to mention this distinguishing mark to the police when first asked to describe the robbers: *R.* v. *Smith* (1975), 12 N.S.R. (2d) 289.

185. Courts of appeal will frequently quash convictions if the witnesses are unable to offer a description of the suspect before identifying him or her, or if their descriptions are so vague that they are of no real assistance in finding a suspect. In *R.* v. *Smith*, *supra* note 89, pp. 438-439 (O.R.), the witness's description was simply that the assailant was wearing a windbreaker and was bareheaded. At trial the magistrate attempted to evince some type of concrete description but the answers he received were vague. When asked about the contours of the appellant's face: "a half kind

of a smile''; distinguishing features: ''I would say he is younger and I would say he was hungry for dough''; specific features: ''he did not look like a fellow who would do such a dirty thing. His features were nice. . . [N]ice eyes; low forehead and his hair combed nice.''

The Court of Appeal concluded:

> If the identification of an accused depends upon unreliable and shadowy mental operations, without reference to any characteristic which can be described by the witness, and he is totally unable to testify what impression moved his senses or stirred and clarified his memory, such identification, unsupported and alone, amounts to little more than speculative opinion or unsubstantial conjecture, and at its strongest is a most insecure basis upon which to found that abiding and moral assurance of guilt necessary to eliminate reasonable doubt. (p. 436)

The Nova Scotia Court of Appeal, in *R.* v. *Shaver* (1970), 2 N.S.R.(2d) 225 (N.S. C.A.), quashed a conviction because it rested entirely upon identification and the eyewitnesses (police officers) were unable to describe the appellant in any satisfactory manner:

> Constable Cheverie's recollection was based entirely on the fact that the boy wore bluish clothing. Constable Murray was more secure in his view and did suggest that he recognized the features, although, as I have said, the trial judge found nothing distinctive about the features of the boy. When Constable Gamache found him in the Volkswagen the boy was wearing a bright blue shirt. That is the sum total of the identification of this youth. (p. 231)

A conviction was also quashed in *R.* v. *McDonald* (1951), 4 W.W.R. (N.S.) 14, 13 C.R. 349, 101 C.C.C. 78 (B.C. C.A.), where the verdict of guilty was based solely upon the identification evidence of two eyewitnesses. The Court of Appeal, in commenting upon the reliability of their evidence, noted that both of them gave only a ''vague, general and unrecognizable description of the robber''. (p. 18 W.W.R. (N.S.), 353 (C.R.), 82 (C.C.C.)). The court further commented that ''[t]here is no nexus between the general description and the individual person. A description which fits 50 men equally can identify no one of them''. (p. 18 W.W.R. (N.S.), 354 (C.R.), 83 (C.C.C.)).

In *R.* v. *Yates*, *supra* note 86, the conviction was quashed because the only evidence implicating the appellant was the identification of a child. Moreover, the child's identification evidence was not very compelling:

> Although she was with the man who assaulted her for over an hour in broad daylight her description of him was most meagre. She could not remember the colour of his hair or his eyes or any other feature which might enable him to be identified or to distinguish him from other men. She was only able to identify him by her recollection of his face and the fact that he was ''young with a low cut moustache.'' (p. 244 (C.R.), 528 (D.L.R.), 456-457 (W.W.R.), 317 (B.C.R.), 342 C.C.C.))

The Court of Appeal also noted:

With respect, the learned Judge ought to have told the jury that such testimony, standing alone, could furnish nothing to distinguish the appellant from dozens of other men who easily fit that general description, and that, standing alone, it was too weak and indefinite to establish any characteristic or combination of traits by which an individual may be recognized and his identity proven. (p. 238 (C.R.), 522 (D.L.R.), 450 (W.W.R.), 310-11 (B.C.R.), 335-36 (C.C.C.))

A conviction was also quashed in *R.* v. *Browne*, *supra* note 35. Here the evidence pointing to the two accused was highly inconclusive and the description of them was vague and unsupported by other pretrial identification evidence:

All they could say was, one boy was tall and the other short.... Mrs. Clark could not describe the dress of either boy because "it was too dark." If it was too dark to obtain even a general impression of the kind of clothes the boys wore, it is understandable it was also too dark to enable Mrs. Clark to obtain a reliable impression of anything about their appearance that could identify them individually.... Mrs. Munro said that while she saw the boys' faces, yet in the fright of the moment, the darkness, and the suddenness of the attack from behind, she could not say the boys in the Court were the criminals; she said "they resembled them very much." (p. 146 (C.C.C.))

186. If the witness's description of the accused is incredibly detailed, the inference might be that the witness received prompting from the police or from some other source, and therefore the reliability of his or her entire evidence is severly undermined. Such was the case in *R.* v. *Craig*, *supra* note 34. The proprietor of a garage at which a particular car stopped for gasoline, identified the accused as the driver of the car. Even though she did not leave the car the witness described the passenger in the car in the following detailed terms:

There was a girl sitting in the front seat of the car, on the left side. She was a girl with a full face. She had rather bright eyes. She rather struck me as being a happy sort of girl, rather wide mouth. She had a long mouth, I would say. She gave me the impression that she was rather happy. She had that look. I should say she was about 18 years of age. I have the impression that she was wearing some beads around her neck. I could not say what colour they were. (p. 446)

In commenting adversely upon the reliability of this witness, a judge of the High Court of Australia (in dissent) noted:

It seems reasonably clear that in giving this detailed description Harvey is unconsciously relying upon the photograph of Bessie O'Connor, which was published in the newspapers as early as December 17th, or upon some other description of her, rather than upon his real recollection of the girl who was in the car. He seems to have had no occasion or reason for specially noting the features or characteristics of the girl. (p. 447)

187. Thus, in *R.* v. *Spatola*, *supra* note 138, Laskin J.A., as he then was, said, "Where some distinguishing marks are noticed and later verified, there is a strengthening of credibility according to the nature of such marks". (p. 82 (O.R.), 153 (C.R.N.S.), 249 (C.C.C.)). In *R.* v. *McKay* (1966), 61 W.W.R. (N.S.) 528 (B.C. C.A.), the appeal from conviction was dismissed in part because the witness's description of the two accused largely fits their physical appearance:

> The two accused were similar in stature to the persons described both in themselves and as compared to one another; that they wore very similar dress when picked up shortly after the occurrence; that Mr. Bruner had a scratched nose as described by Mr. Mostron; that Mr. Bruner had a broken or oddly shaped nose as described by Mr. Buyer.... (p. 530)

188. This argument was made by defence counsel in *R.* v. *Audy (No. 2)* (1977), 34 C.C.C. (2d) 231 (Ont. C.A.). The judge in noting the argument said:

> This of course was based upon the conflicting descriptions given to the police by the eyewitnesses shortly after the robbery occurred; upon the failure of witnesses who might have been expected to identify the appellant, if he were one of the robbers, but who were not able to do so; and the fact that several of the persons who were in one sense or another spectators at the event could not identify the appellant. (p. 236)

The appeal was, however, dismissed since the trial judge had given a general warning to the jury about the dangers of identification evidence and there was clearly some evidence to support the verdict, since three witnesses had selected the appellant from photographs and a lineup. See also *R.* v. *Pett and Bird*, 10 J.P. Supp. 48, [1968] *Criminal Law Review* 388 (C.C.A.)

189. See T. H. Howells, "A Study of Ability to Recognize Faces", 33 *Journal of Abnormal and Social Psychology* 124 (1938); G. H. Davies, J. Shepherd and H. Ellis, "Remembering Faces: Acknowledging Our Limitations", 18 *Journal of the Forensic Science Society* 19 (1978); K. R. Laughery and R. H. Fowler, "Sketch Artist and Identi-Kit Procedures for Recalling Faces", 65 *Journal of Applied Psychology* 307 (1980); Christie and Ellis, "Photofit Construction versus Verbal Descriptions of Faces", 66 *Journal of Applied Psychology* 358 (1981).

190. See R. S. Malpass, H. Lavigueur and D. E. Weldon, "Verbal and Visual Training in Face Recognition", 14 *Perception and Psychophysics* 285 (1973); M. M. Woodhead, A. D. Baddeley and D. C. V. Simmonds, "On Training People to Recognize Faces", 22 *Ergonomics* 333 (1979); R. S. Malpass, "Training in Face Recognition", in G. Davies, H. Ellis and J. Shepherd, eds., *Perceiving and Remembering Faces* (New York: Academic Press, 1981).

191. E. Belbin, "The Influence of Interpolated Recall Upon Recognition", 2 *Quarterly Journal of Experimental Psychology* 163 (1950).

192. L. Williams, "Application of Signal Detection Parameters in a Test of Eyewitnesses to a Crime", *Psychology Thesis*, Brooklyn College, S.U.N.Y., 1-31 (1975).

193. *Id.*, p. 21.

194. J. Marshall, *Law and Psychology in Conflict*, 2nd ed. (Indianapolis: Bobbs-Merrill, 1980); D. G. Hall, "Obtaining Eyewitness Identifications in Criminal Investigations: Two Experiments and Some Comments on the Zeitgeist in Forensic Psychology", Thiel College, unpublished manuscript, 1976; G. Davies, "Face Identification: The Influence of Delay Upon Accuracy of Photofit Construction", 6 *Journal of Police Science and Administration* 35 (1978).

195. See Blouin, *supra* note 123.

196. See Hall, *supra* note 194.

197. There are a number of possible explanations as to why detailed questioning of witnesses might interfere with their ability subsequently to identify the suspect. First, since facial recognition may be primarily a visual memory process, police questioning may create a conflict between the witness's verbal and visual processes that detracts from the clarity of the witness's visual image. Second, since witnesses will invariably only give a partial description of the person they saw, they may make a commitment to their limited memory of the suspect which subsequently influences and biases their identification of a suspect. Third, and this is simply a commonsense notion, since people are not particularly good at describing appearances, there is a danger that witnesses who have previously provided the police with an inaccurate description of the offender might at subsequent identification proceedings feel compelled only to identify someone fitting the description given earlier. Having committed themselves to a certain position, the witnesses will experience dissonance if faced with a person who bears a strong resemblance to their image of the offender but whose appearance does not correspond with their previous description. This dissonance may be resolved by the witness's unconsciously altering his image of the offender's appearance to fit the description already given to the police. An honest but mistaken identification might thereby be given.

198. This argument was made in the *Devlin Report*, *supra* note 12. Although not fully persuaded by the argument, the Devlin Committee did not recommend that police be obliged to obtain descriptions; only that as a matter of administrative practice they do so whenever practicable. They wrote in their report:

> Our conclusion is that descriptions are not of sufficient evidential value to be made the subject of legal rules whose operation might handicap the search for the criminal. There should, however, be an administrative rule that the police are to obtain descriptions wherever practicable, which we believe will be in the great majority of cases. We think that there should be a legal duty to supply a description [to the defence] if one has been obtained. (p. 107)

The Home Office Circular which implemented many of the recommendations of the *Devlin Report* did not contain any rules dealing with taking descriptions. See *supra* note 12.

199. J. M. Mandler and R. E. Parker, "Memory for Descriptive and Spatial Information in Complex Pictures", 2 *Journal of Experimental Psychology: Human Learning and Memory* 38 (1976).

200. Doob and Kirshenbaum, *supra* note 40.

201. For example, in one study which involved viewing a filmed assault, subjects who responded freely, without questioning, were 91 per cent accurate in their recall of 21 per cent of the available information; subjects given open-ended questions showed 83 per cent accuracy in recalling 32 per cent of the information; subjects given highly structured (leading questions and multiple choice) questioning were 64 per cent accurate in recalling 77 per cent of the available information. J. P. Lipton, "On the Psychology of Eyewitness Testimony", 62 *Journal of Applied Psychology* 90 (1977). See also H. M. Cady, "On the Psychology of Testimony", 35 *American Journal of Psychology* 110 (1924); T. J. Snee and D. E. Fush, "Interaction of the Narrative and Interrogatory Methods of Obtaining Testimony", 11 *Journal of Psychology* 229 (1941).

In another study, a film of a scuffle among five people was shown to subjects who gave a free report of the film, and were then given one of four differently structured interviews. Open-ended interviews included either moderate guidance or high guidance; and structured interviews were either multiple choice or leading questions. Similarly to Lipton, above, the authors of this study, Marquis, Marshall and Oskamp found that accuracy of reports was negatively related to completeness. The free reports were 93 per cent accurate and 28 per cent complete; reports based on moderate-guidance open-ended questions were 90 per cent accurate and 47 per cent complete; high-guidance open-ended reports were 87 per cent accurate and 56 per cent complete; multiple-choice reports were 82 per cent accurate and 83 per cent complete; leading question reports were 81 per cent accurate and 84 per cent complete. K. H. Marquis, J. Marshall and S. Oskamp, "Testimony Validity as a Function of Question Form, Atmosphere and Item Difficulty", 2 *Journal of Applied Social Psychology* 167 (1972). While the completeness of these reports closely parallels those of Lipton's study, the subsequent loss in accuracy found in Marquis is far less severe. Marquis reports that the trade-off of accuracy for completeness is much greater for questions determined in a pilot study to be difficult, than it is for questions determined to be easy. One plausible explanation for these findings is that witnesses are more vulnerable to the effects of specific or suggested questioning when their memory of the issue is less clear. They may be more resistant to suggestive questioning regarding events for which their memories are strong. For easy questions, direct questioning produces more completeness with little loss in accuracy, while for difficult questions, the loss in accuracy with highly structured questioning is greater.

This explanation has been confirmed by a subsequent study which found "no significant difference in recall accuracy under narrative and interroga-

tive reports" where only easy items were provided. B. Clifford and J. Scott, "Individual and Situational Factors in Eyewitness Testimony", 63 *Journal of Applied Psychology* 352 at 357 (1978). However, since the police will have no way of knowing whether they are asking a witness to recall easy or difficult details, in order to obtain accurate answers, a free narrative should always be used first, as suggested in the text. This order of questioning has been suggested by several psychologists: See, for example, E. R. Hilgard and E. F. Loftus, "Effective Interrogation of the Eyewitness", 27 *International Journal of Clinical and Experimental Hypnosis* 342 at 349 (1979):

> Given that one procedure (narrative form) is better in terms of enhancing accuracy while another (interrogatory form) leads to more completeness, which procedure should be used in interrogation? In fact, there is now sound psychological basis for proposing that both forms should be used, but the order in which they should occur is important. It is generally agreed that the narrative report should come first, followed by the interrogatory report form. That is, first let the witness tell the story in his or her own words, and when the witness is finished, then begin asking a set of specific questions.

202. *Id.*

203. Loftus, *supra* note 37, p. 93.

204. See generally studies cited in notes 37, 201 and 203, *supra*.

205. Loftus, *supra* note 37.

206. *Id.*, pp. 94-97.

207. R. J. Harris, "Answering Questions Containing Marked and Unmarked Adjectives and Adverbs", 97 *Journal of Experimental Psychology* 399 (1973).

208. See R. Hastie, R. Landsman and E. F. Loftus, "Eyewitness Testimony: The Dangers of Guessing", 19 *Jurimetrics Journal* 1 (1978); Loftus, *supra* note 37, p. 82 and following (urging a witness to guess can reduce the reliability of a later eyewitness report).

209. Hall, *supra*, note 194, p. 17 ("It seems to be the case that asking a subject to concentrate on minor, obscure details of a face interferes with the subject's ability to obtain other more general and more useful bits of information about the face").

210. See *supra*, note 135.

211. See *supra*, notes 37, 191.

212. See generally Yarmey, *supra* note 37, pp. 147-152; Clifford and Bull, *supra* note 37, pp. 99-110.

213. For a detailed description, see J. F. Wiley, "Recent Developments in

Criminal Identification Techniques: The Penry Composite Photograph", *Crown Newsletter* 1 (June, 1976).

214. See Yarmey, *supra* note 37, p. 147.

215. See studies discussed in Yarmey, *supra* note 37, p. 151.

216. See, for example, H. Ellis, J. Shepherd and G. Davies, "An Investigation of the Use of the Photo-fit Technique for Recalling Faces", 66 *British Journal of Psychology* 29 (1975); G. Davies, H. Ellis and J. Shepherd, "Cue Saliency in Faces as Assessed by the 'Photofit' Technique for Recalling Faces", 66 *British Journal of Psychology* 29 (1975); G. Davies, H. Ellis and J. Shepherd, "Cue Saliency in Faces as Assessed by the 'Photofit' Technique", 6 *Perception* 263 (1977); G. Davies, "Face Recognition Accuracy as a Function of Mode of Representation", 63 *Journal of Applied Psychology* 180 (1978); G. Davies, "Face Identification: The Influence of Delay Upon Accuracy of Photofit Construction", 6 *Journal of Police Science and Administration* 35 (1978); J. W. Shepherd, H. D. Ellis, M. McMurran and G. M. Davies, "Effect of Character Attribution on Photofit Construction of a Face", 8 *European Journal of Social Psychology* 263 (1978).

217. See generally Yarmey, *supra* note 37, p. 150.

218. See studies cited in Clifford and Bull, *supra* note 37, p. 103. Previous studies found, however, that asking individuals to recall faces would reduce their later recognition performance.

219. (1971), 60 Q.J.P.R. 24 (Queensland District Ct.).

220. *Id.*, p. 25

221. *R.* v. *Kobelnak* (unreported, Toronto), referred to in Wiley, *supra* note 213.

222. The *Devlin Report*, *supra* note 12, traces the use of the identification parade to the 1860s, when it "appears to have been invented by the police, probably in response to judicial criticism of cruder methods of identification such as a direct confrontation between the witness and the suspect" (p. 3). In fact, evidence of earlier use of this method of identification is provided in an 1853 case where "the witness had been taken to the county prison, and ten men were shown to him ... [and] he had pointed out one of those ten men...". *R.* v. *Blackburn* (1853), 6 Cox. C.C. 333 at 338.

223. *R.* v. *Smith and Evand* (1908), 1 Cr. App. R. 203 at 204 (the accused's application for leave to appeal was refused because there was sufficient independent evidence to justify their convictions). See also *Chapman* v. *The King* (1911), 7 Cr. App. R. 53 at 55 (C.C.A.) ("That is not a satisfactory way of identification"); *R.* v. *Williams* (1912), 8 Cr. App. R. 84 at 88 (C.C.A.) ("[T]he mode adopted was not a proper one, and therefore the identification cannot be said to have been satisfactory").

224. *R.* v. *Gaunt*, *supra* note 78.

225. *Id.*, pp. 865-866. In another case where the accused was shown alone to a witness, who was then asked whether he was the man in question, the High Court of Australia agreed with the view previously taken by England's Court of Criminal Appeal: "They treat it as indisputable that a witness, if shown the person to be identified singly and as the person whom the police have reason to suspect, will be much more likely, however fair and careful he may be, to assent to the view that the man he is shown corresponds to his recollection": *Davies and Cody* v. *The King*, *supra* note 77, p. 181. Other Australian cases in which courts have voiced dissatisfaction with identifications obtained at confrontations between the witness and the accused are: *R.* v. *Aiken*, *supra* note 183; *R.* v. *Evensen* (1916), 33 W.N. 106 (Aust., Ct. Cr. App.); *R.* v. *Harris*, (1971), S.A.S.R. 447 (Sup. Ct., So. Aust.); *R.* v. *Martin* [1956] V.L.R. 87 (Sup. Ct., Vict.).

226. *R.* v. *Gaunt*, *supra* note 78, p. 866. See also *Davies and Cody* v. *The King*, *supra* note 77.

227. *R.* v. *Smierciak*, *supra* note 85, pp. 157-158 D.L.R., 872 O.W.N., 436-437 C.R., 177 C.C.C. In a recent Nova Scotia case, however, the Court of Appeal dismissed the accused's appeal without commenting on the fact that the two witnesses had identified the accused at a police station confrontation: *R.* v. *Johnson* (1976), 17 N.S.R. (2d) 494.

228. See also *People* v. *Martin*, [1956] G.R. 26.

229. It is not clear from the cases whether the identification evidence is to be completely ignored in such cases, and thus the independent evidence alone must justify the conviction, or whether the appeal court in reviewing the evidence can place some weight on the identification evidence if it appears reliable in spite of the method of identification.

230. See, *supra* note 175.

231. *Id.*, p. 302.

232. See, *supra* note 179.

233. *Id.*, p. 198.

234. *Id.*, p. 199.

235. *Manson* v. *Braithwaite*, *supra* note 179.

236. See *supra* note 150.

237. See Rule 505(1) and commentary.

238. H. R. Dent and G. M. Stephenson, "Identification Evidence: Experimental Investigations of Factors Affecting the Reliability of Juvenile and Adult Witnesses", in D. P. Farrington, K. Hawkins and S. M. Lloyd-Bostock, *Psychology, Law and Legal Processes* (London: Macmillan, 1979), 195 at 201 "The results showed that identification performance was best in the one-way screen condition, with 40 per cent correct identifications, and worst in the conventional parade condition, with 18 per cent correct identifications .... There were thirty per cent correct identifications in the colour slides condition"; E. Brown, K. Deffenbacher, and W. Sturgill, "Memory for Faces and the Circumstances of Encounter", 62 *Journal of*

Applied Psychology 311 at 315 (1977). It is difficult to compare recognition accuracy for the lineups vs. mugshots in this study, as mugshots were presented only an hour after exposure, while lineups were conducted after one week. However, it is interesting to note that recognition accuracy was 72 per cent in the mugshot phase, and dropped to 51 per cent (when mugshots had not been seen) in the lineup phase. More interesting, however, is the fact that false identifications also dropped from 45 per cent with mugshots to 8 per cent with lineups. Thus, it would seem that mugshot presentations encourage subjects to make more identifications; however, the advantage of more correct identifications is offset by the greater number of false identifications with mugshots than with lineups. Indeed the authors concluded "it would appear that our subjects found it easier to recognize live criminals when they reappeared live — even when that appearance occurred a week later — than to recognize them from photographs" ; D. Egan, M. Pittner and A. G. Goldstein, "Eyewitness Identification: Photographs vs. Live Models", 1 *Law and Human Behavior* 199 (1977) (Witnesses who viewed a "criminal" in person were divided into two groups, one of which later viewed a live lineup, the other of which was shown mugshots of the same people as appeared in the lineup. Witnesses viewing the lineup were able correctly to pick out the criminal 98 per cent of the time while those who were presented with the criminal's photograph were only able to pick him out 85 per cent of the time. Indeed, the authors suggested that the 12 per cent difference may be understated since other factors which influence accurate identifications were not taken into account).

239. For instance, in *R.* v. *Nagy* (1967), 61 W.W.R. 634 (B.C. C.A.), one of the two witnesses had identified the accused in a store two days after the commission of the offence. Thereafter both witnesses identified the accused from ten photographs displayed by the police. The British Columbia Court of Appeal held that this identification evidence was sufficient to convict without expressing a preference for lineup identification evidence. Similarly in *R.* v. *Prentice*, *supra* note 153, photographic identification evidence was held to be sufficient to convict, even though a lineup would have been possible, since a description of the accused and the license plate number of his truck led the police to a likely suspect. Again, in *R.* v. *Richards*, *supra* note 142, the court failed to comment upon the improper procedures used to procure the identification evidence. The witness had failed to identify the accused from two series of photographs but was later "successful" when shown a single photograph of the accused alone; clearly a suspect had already been selected and thus a lineup could have been staged. Finally, a witness in *R.* v. *Spatola*, *supra* note 138, told the police that he recognized one of the robbers and gave a detailed description of the man. The witness then picked out a photograph of the accused from twelve photographs; no lineup was held. Although a new trial was held because the trial judge failed to give a general warning about the inherent frailties of eyewitness identification, no mention was made of the failure to hold a lineup.

240. (1961), 45 Cr. App. R. 220, [1961] *Criminal Law Review* 541 (C.C.A.).

241. *Id.*, p. 224 (Cr. App. R.).

242. (1962), S.R. (N.S.W.) 563, 79 W.N. (N.S.W.) 423, [1962] N.S.W.R. 1034 (N.S.W. Ct. Cr. App.).

243. *Id.*, p. 563 (S.R. (N.S.W.)). In both *Seiga*, *supra* note 240, and *Bouquet*, *id.*, the accused's appeal from conviction was dismissed. The courts held that the failure of the police to arrange a lineup affected the weight, but not the admissibility, of the identification evidence. In *Seiga* the court stated: "While the court disapproves of the conduct of the detective constable, that conduct does not in the opinion of the court afford sufficient ground for setting aside the conviction" (p. 224). In *Bouquet*, the judge noted that "[t]he use of photographs in this way, in lieu of a personal identification parade, goes to the weight and sufficiency of the evidence rather than to its admissibility and may be specially significant when there is no other evidence identifying the accused" (p. 560).

244. *R.* v. *Russell*, [1977] N.Z.L.R. 20 (N.Z. C.A.).

245. *Id.*, p. 28.

246. In *R.* v. *Dean*, [1942] O.R. 3, [1942] 1 D.L.R. 702, 77 C.C.C. 13 (Ont. C.A.), the witness was shown "a number of photographs to see whether he could help them in their search for the man who had escaped, by picking out his photograph". (p. 4 (O.R.)) The photograph the witness picked was that of the accused, who was arrested two years later. The court stated:

> [F]or the purpose of aiding the Crown in apprehending the guilty party (whoever he might be) Boivin was shown a variety of photographs and was asked whether he could pick out from among those photographs a picture of the second man who took part in the assault in question. ... In my opinion this exhibition of photographs to Boivin for the assistance of the police in discovering the wanted criminal was a proceeding entirely warrantable and proper .... (p. 10 (O.R.))

Photographs were also shown to witnesses by the police during the initial stages of their investigation when they had no suspect, and such a practice was approved in *R.* v. *Cadger* (1957), 119 C.C.C. 211 (B.C. C.A.) and in *R.* v. *Dixon*, *supra* note 149.

In *The King* v. *Hinds*, [1932] 2 K.B. 644, the Court of Criminal Appeal expressed approval of the following direction given to the jury at trial:

> [T]here is no objection to the police who are seeking for information as to the person or persons who may have committed a crime showing to persons who are able to identify the criminal a photograph or a series of photographs to see if they can pick out any one of them which resembles the person whom they think they would be able to identify. (p. 645)

It is interesting to note the reference made to the practice of showing a single photograph to witnesses. In this case, the witnesses were, in fact, shown a series of photographs. That perhaps accounts for the failure of the Court of Criminal Appeal to correct this obvious error.

The Supreme Court of South Australia had this to say in *R.* v. *Goode*, *supra* note 152, p. 79:

In cases where the victim cannot name the criminal an obvious, and indeed on occasions an indispensable, method of police investigation, is to offer a number of photographs for the victim's inspection, and this is legally unobjectionable, so long as he is not shown a photograph of the accused alone but given a number to choose from, covering as far as possible a range of persons roughly similar in appearance.

And the Supreme Court of Victoria in *R.* v. *Voss*, [1963] V.R. 22, stated that:

[T]he use of photographs by the police for the purpose of assisting them in their investigation is a matter which is quite proper and a procedure which is well recognized.

247. *R.* v. *Armstrong*, [1941] Qld. S.R. 161 at 163, 35 Qld. J.R.R. 76 (Qld. C.C.C.A.); see also *R.* v. *Kingsland* (1919), 14 Cr. App. R. 8 (C.C.A.).

248. In *R.* v. *Bagley*, [1926] 2 W.W.R. 513, [1926] 3 D.L.R. 717, 37 B.C.R. 353, 46 C.C.C. 257 (B.C. C.A.), there were six eyewitnesses to the robbery of a bank in Nanaimo, British Columbia. Several weeks after the robbery, they were called to the police station at Nanaimo where they were shown a number of photographs, including some photographs of the accused, who was being detained with other suspects on suspicion by the police in Seattle, Washington. Martin J. A., for the majority, wrote:

[I]n the present [case] I cannot perceive any good ground for holding that it was unfair to take the course adopted. It seems to me entirely reasonable that the Crown officers here should before sending prospective witnesses into a foreign state to identify persons therein detained on strong suspicion take the precaution of showing them sets of photographs in the usual fair and cautious way that has long been in practice here instead of embarking them upon purely speculative and expensive journeys at great and unnecessary cost to the country .... (pp. 519-520 (W.W.R.))

However, Chief Justice MacDonald in his dissenting opinion rejects the argument that the propriety of the procedure adopted should be determined on the basis of convenience. He noted the decisions of the English Criminal Court of Appeal, which embody "the opinions of a large number of eminent Judges", showing that it is wrong for police to exhibit to witnesses photographs of people who are already under arrest. In reference to the procedure adopted in the case on appeal he stated:

It was urged by Crown counsel, that the English rule in this regard, or what is tantamount to a rule, could not be applied in all its strictness in Canada, because of the difference in local conditions brought about by the extent of our sparsely settled territories and the inconvenience and expense of carrying witnesses long distances to make personal identification. I do not agree that any such distinction can be maintained. An accused person in Canada is entitled to as fair a trial as one in any other part of the Empire, and as the question involved here is one touching the fairness of the trial and the danger to the accused of the course which is here criticized, no question of inconvenience or expense can be allowed to affect that right. (p. 514 (W.W.R.))

Chief Justice MacDonald, in his dissent, referred to the English case of *R.* v. *Haslam* (1925), 19 Cr. App. R. 59 (C.C.A.). Based on this English case, identification evidence, such as that at issue in *Bagley*, would have been held valueless and a conviction based exclusively on it would have been set aside. Nevertheless, in another English case, *R.* v. *Chadwick, Matthews and Johnson*, *supra* note 149, where there were two witnesses to a robbery in Coventry, the police took pictures of four suspects, whom they were holding in Sheffield, and sent them to Coventry where they were displayed, among others, to the two witnesses. The court had this comment:

> In view of the explanation which has been given of the reason why the photographs were sent from Sheffield to Coventry (namely, that the police might know whether to detain the four men — whom they already had in custody — or not), it is clear that no blame attaches to the police in regard to the course which was pursued. (p. 249)

However, the court did show dissatisfaction with the identification procedure used in that the photographs of the accused men were exhibited on different cards than the other photographs since the Sheffield police used different cards than the Coventry police. Furthermore, after having identified the accused from these distinctive photographs, the witnesses were then required to identify the accused from lineups.

249. (1931), 56 C.C.C. 263, 50 Que. K.B. 300 (Que. C.A.).

250. *Id.*, p. 268 (C.C.C.). A more proper course of action would have been to show the apartment employees an array of photographs.

251. See, for example, K. E. Patterson and A. D. Baddeley, "When Face Recognition Fails", 3 *Journal of Experimental Psychology: Human Learning and Memory* 406 (1977).

252. *Asharfi* v. *State*, *supra* note 65, p. 162.

253. See *supra* note 150.

254. [1941] 2 D.L.R. 480, 76 C.C.C. 270 (Ont. C.A.).

255. *Id.*, p. 480 (D.L.R.). The same observation was made by the United States Supreme Court in *Simmons* v. *U.S.*, 390 U.S. 377 at 383-384 (1968): "the witness thereafter is apt to retain in his memory the image of the photograph rather than that of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification". The High Court of Australia has made a similar observation:

> [I]nspection of a photograph of the person in custody before viewing him naturally tends to impress on the mind the characteristics shown in the photograph, so that the witness, however honest he may be, tends to identify the person in custody with the person shown in the photograph rather than with the person whom he himself saw previously. (*Davies and Cody* v. *The King*, *supra* note 77, pp. 181-82)

256. In *R.* v. *Dean*, *supra* note 246, p. 5, for instance, Robertson C.J.O. remarked: "There can be no doubt that the act of the police in showing Boivin the photograph of [the appellant] to refresh his memory before

asking him to identify his assailant at the 'line-up', is open to some adverse comment." A similar view was expressed in *The King* v. *Dwyer and Ferguson*, *supra* note 59 at p. 802: "It would be most improper to inform a witness beforehand, who was to be called as an identifying witness, by the process of making the features of the accused person familiar to him through a photograph." Again, in *R.* v. *Haslam*, *supra* note 248, p. 60, this procedure was criticized: "The appellant had already been arrested, and the effect of what was done was to give the witnesses — or certainly three of them — an opportunity of studying a photograph of the appellant before they were called on to identify him. That course is indefensible." For similar comments see: *R.* v. *Goss* (1923), 17 Cr. App. R. 196 at 197; *R.* v. *Watson*, [1944] 2 D.L.R. 801 at 803, [1944] O.W.N. 258, 81 C.C.C. 212 (Ont. C.A.); *R.* v. *Simpson*, *supra* note 152, p. 136 (C.C.C.); and *R.* v. *Sutton*, *supra* note 38, p. 361 (O.R.).

Only one case has ventured in the opposite direction on this point. Mr. Justice Barclay in *Baxter* v. *The Queen* (1952), 106 C.C.C. 15 at 19 (Que. Q.B.) remarked that:

> Counsel for the defence claims that the force of these identifications is greatly weakened because the witnesses were shown photographs and newspaper pictures [and subsequently identified the appellant in a lineup] .... But both these witnesses failed to identify any photographs or newspaper pictures, so that the danger of identification after seeing photographs is not present in this case.

Clearly the danger of the use of such evidence was not understood.

257. *The King* v. *Dwyer and Ferguson* , *supra* note 59, p. 802 (K.B.).

258. Thus, in *R.* v. *Baldwin* (1944), 82 C.C.C. 15 (Ont. C.A.) it was held:

> Evidence as to identity, given by witnesses who have seen photographs of an accused after his arrest, (whether in newspapers or otherwise) is not, by reason of such fact, rendered inadmissible, although it is improper for the police to permit any display of photographs of persons who have been arrested before they have been identified by everyone who might be called as a witness as to identity, and evidence so procured will lose much of the weight that it otherwise might have, and it is the duty of the trial Judge under such circumstances to call the attention of the jury to what has happened, and properly to caution the jury.

See also *R.* v. *Martin*, *supra* note 225.

In *R.* v. *Hunjan* (1978), 68 Cr. App R. 99 (C.C.A.), the court quashed the conviction because it could not be certain that the jury would have reached the same result had the trial judge given the proper warning. He failed to point out that:

> [I]dentification witnesses may be, and frequently are, highly convincing though they may honestly be totally mistaken .... [S]everal identifying witnesses may all suffer from that defect .... [M]istakes in identification are possibly the easiest mistakes which any witness can make .... [T]hree of the officers had seen a photograph of the appellant between

the time when the events took place and the time when the identification parade was held .... [T]he obvious danger [is] that in complete honesty these men may have been identifying the person in the photograph rather than the person whom they had seen at or near the public house on that evening. (p. 103)

Similarly, in *R.* v. *Sutton*, *supra* note 38, a conviction was quashed because the trial judge cautioned the jury only on the credibility of the witness and failed to elaborate on the problems of identification evidence generally and, in particular, failed to underline the fact that the witness had identified the appellant prior to the lineup even when the police had pointed out a photograph of the appellant.

When a Court of Appeal considers the decision of a trial judge sitting alone, it will likewise attempt to ascertain whether the judge was aware of the problems with this type of evidence. Thus, in *Baxter* v. *The Queen*, *supra* note 256; *R.* v. *Prentice*, *supra* note 153; and *R.* v. *Goldhar*, *supra* note 254, the appeals from conviction were dismissed since the judges had evidently properly instructed themselves regarding the probative value of the evidence when photographic identification had preceded corporeal identification.

259. The court in *The King* v. *Hinds*, *supra* note 246, p. 646, for instance, said that the photographic display was used "with the object of ascertaining whether they could pick out a person not yet in custody so that he might be arrested on suspicion". The display and the lineup were properly conducted and thus special instructions by the trial judge were not required. Other cases which seem to support this view are *R.* v. *Watson*, *supra* note 256; *R.* v. *Fannon* (1922), 22 S. R. (N.S.W.) 427, 39 W.N. (N.S.W.) 130 (N.S.W. Ct. Cr. App.); *R.* v. *Cadger*, *supra* note 246; *R.* v. *Haslam*, *supra* note 248; *R.* v. *Seiga*, *supra* note 240; *R.* v. *Bagley*, *supra* note 248; *R.* v. *Bouquet*, *supra* note 242; and *R.* v. *Doyle*, [1967] Vict. L.R. 698 (Vict S.C.).

260. [1938] N.Z.L.R. 139 (N.Z. S.C.).

261. *Id.*, p. 141.

262. *Id.*, p. 141-142. See also *R.* v. *Bagley*, *supra* note 248, in which prospective witnesses were shown photographs of suspects, including that of the accused. Some of these witnesses later identified the accused in a lineup. MacDonald C.J.A., in dissent, held that while the trial judge "referred several times to the fact that photos were shown to the several witnesses ... he made no comment upon the effect of that on the weight of the witnesses' testimony. That phase of the matter was apparently not present to his mind, and in these circumstances the verdict cannot be sustained". (p. 515 (W.W.R.)) However, the majority sustained the conviction.

263. *R.* v. *Dickman*, *supra* note 98, p. 142-143 (Cr. App. R.).

264. (1960), 129 C.C.C. 336 (B.C. C.A.).

265. O'Halloran J.A., dissenting, pointed out that the cross-examiantion of the witness disclosed that he was unable to point to any physical or other

characteristic upon which identification of the accused could be rationally based. Furthermore, not only did the identification take place several months after the alleged transaction in question, but the witness had never known or seen the accused previously. While the accused completely denied the transaction and was not shaken on cross-examination, the story of the witness was false in two particulars and may have been motivated by self-interest. Taking these doubts together, O'Halloran J.A. was of the opinion that the witness's testimony was insufficient to prove beyond a reasonable doubt that the accused was the guilty person.

266. *Supra* note 183.

267. *Supra* note 34.

268. *Supra* note 68.

269. (1951), 52 G.L.J. 1123 (Hyderabad H.C.).

270. *Id.*, p. 1125.

271. (1952), 53 Cr. L.J. 265, 39 A.I.R. 59 (Allahabad H.C.).

272. *Id.*

273. *Dhaja Rai* v. *The Emperor*, [1948] A.I.R. (A) 241 (Allahabad H.C.).

274. See generally E. Ratushny, *Self-Incrimination in the Canadian Criminal Process*. (Toronto: Carswell, 1979), p. 292 and following.

275. A number of states in the United States now provide by statute or rule of court that a court order can be obtained compelling a suspect to attend an identification procedure, including a lineup. Indeed such a court order can be obtained in most states with a showing of less than probable cause. See Commentary to Section 170 of the American Law Institute, *Model Code*, *supra*, note 15, p. 475; Y. Kamisar, W. R. LaFave, and J. H. Israel, eds., *Modern Criminal Procedure: Cases, Comments and Questions* (St. Paul, Minn.: West, 1980), p. 708-710. If there is probable cause and judicial authorization of a lineup, participation can be made a condition of pretrial release and an uncooperative defendant can be held in contempt. See *Doss* v. *United States*, 431 F. 2d 601 (9th Cir., 1970).

276. As a matter of interest, in the United States the defendant can be cross-examined at trial about uncooperativeness, and the prosecutor can argue that a failure to cooperate is evidence of guilt. See *United States* v. *Parhms*, 424 F. 2d 152 (9th Cir., 1970), cert. denied 400 U.S. 846. But see D. E. Seidelson, "The Right to Counsel: From Passive to Active Voice", 38 *George Washington Law Review* 849 (1970).

277. See *Marcoux and Solomon* v. *The Queen* (1975), 29 C.R.N.S. 211 at 219, [1976] 1 S.C.R. 763, 60 D.L.R. (3d) 119, 29 C.R.N.S. 211.

278. For a review of these values see generally L. W. Levy, *Origins of the Fifth Amendment* (New York: Oxford University Press, 1968); M. Berger, *Taking the Fifth* (Lexington, Mass.: Lexington Books, 1980); L. Mayers, *Shall We Amend The Fifth Amendment?* (Westport, Conn.: Greenwood Press, 1959); J. A. Maguire, *Evidence of Guilt: Restrictions upon Its Discovery or Compulsory Disclosure* (Boston: Little, Brown and Co.,

1959); E. Ratushny, *supra* note 274; E. W. Cleary, *McCormick's Handbook of the Law of Evidence* (St. Paul, Minn.: West Publishing, 1972).

279. For example, in *Dallison* v. *Caffery*, [1965] 1 Q.B. 348, [1964] 3 W.L.R. 385, [1964] 2 All E.R. 610 (Eng. C.A.), Lord Denning M.R. said:

> When a constable has taken into custody a person reasonably suspected of felony, he can do what is reasonable to investigate the matter, and to see whether the suspicions are supported or not by further evidence .... The constable can put him [the suspect] up on an identification parade to see if he is picked out by witnesses. So long as such measures are taken reasonably, they are an important adjunct to the administration of justice. (p. 367 (Q.B.))

In the same vein, Dickson J. in *Marcoux and Solomon* v. *The Queen*, *supra* note 277, p. 771 (S.C.C.), sanctioned the use of reasonable compulsion to secure a lineup identification of a suspected person:

> Reasonable compulsion to this end is in my opinion an incident to the police power to arrest and investigate, and no more subject to objection than compelling the accused to exhibit his person for observation by a prosecution witness during a trial.

280. In the United States, the courts have consistently held that the privilege against self-incrimination only applies to evidence of a testimonial or communicative nature. See generally Cleary, *supra* note 278, p. 264 and following; Berger, *supra* note 278, p.80 and following.

281. Commenting on the privilege against self-incrimination as contained in the *Bill of Rights*, Laskin J., as he then was, observed in *Curr* v. *The Queen*, [1972] S.C.R. 889 at 912:

> I cannot read s. 2(d) as going any farther than to render inoperative any statutory or non-statutory rule of federal law that would compel a person to criminate himself before a court or like tribunal through the giving of evidence, without concurrently protecting him against its use against him.

In *Marcoux and Solomon* v. *The Queen*, *supra* note 277, p. 768 (S.C.C.), Dickson J., in reviewing the privilege against self-incrimination, said: "The limit of the privilege against self-incrimination is clear. The privilege is the privilege of a witness not to answer a question which may incriminate him."

282. See, *supra* note 277, pp. 770-771 (S.C.R.).

283. Dickson J. said:

> I should make it clear, however, that I do not think evidence of the offer and refusal of a line-up will be relevant and admissible in every case in which identification of an accused is in issue. Admissibility will depend upon the circumstances of the case. If, at trial, it unfolds that the Crown must explain the omission of a line-up or accept the possibility of the jury drawing an adverse inference, then in those circumstances it would seem that evidence of refusal is both relevant and admissible. In other circumstances I do not think such evidence should normally be

tendered. The danger, as I see it, is that it may impinge on the presumption of innocence, the jury may gain the impression there is a duty on the accused to prove he is innocent. However, on the facts of the present case, I have no doubt whatever that evidence of Marcoux's refusal to take part in the line-up was admissible, coming as it did after the issue was opened by defence counsel.... (pp. 774-775 (S.C.R.))

In this case defence counsel launched a vituperative attack upon the police. It was maintained that the investigating officer had broken "every rule in the book" by not holding a lineup, that the instructions and pamphlets of the Metropolitan Toronto Police had been "spat upon" and that what had occurred at the police station was a "mockery" (p. 766 (S.C.R.)). This development, in the view of Mr. Justice Dickson, made the evidence of the accused's refusal admissible:

> As to the admissibility of evidence of refusal by Marcoux to participate in a line-up, it is only necessary to observe that the trial tactics of defence counsel made this evidence admissible beyond any question; admissible, not for the purpose of proving guilt, but to explain the failure to hold an identification parade and the necessity, as a result, to have Fleskes confront Marcoux, a procedure which counsel for Marcoux so roundly critized. (p. 773 (S.C.R.))

The Marcoux case is discussed in E. Ratushny, *supra* note 274, p. 56-58. For a critical comment see S. A. Cohen, *supra* note 21, pp. 82-85.

In a recent Ontario case, a *voir dire* was held to determine whether evidence of the accused's refusal should be admitted. The accused offered as an explanation the fact that he wanted to consult first with his lawyer. However, since the accused had on a previous occasion been advised by his lawyer not to appear in a lineup, the court was of the view that the prosecution was entitled to proceed with a dock identification. Citing *Marcoux* in support of his decision, the trial judge ruled at the end of the *voir dire* that the evidence of the accused's refusal was admissible by way of explanation for the adoption by the police of a less-than-ideal method of identification. *R.* v. *Holberg and Russell* (1978), 42 C.C.C. (2d) 104 (Ont. Co. Ct.).

284. Noting that statisticians generally employ a 5 per cent level for establishing significance, this has led two statisticians to suggest that a lineup should ideally consist of twenty participants. W. R. Bytheway and M. Clarke, "The Conduct and Uses of Identificaion Parades", [1976] *Journal of Criminal Law* 198 at 201.

285. See K. R. Laughery, J. F. Alexander and A. B. Lane, "Recognition of Human Faces: Effects of Target Exposure, Target Position, Pose Position and Type of Photograph", 55 *Journal of Applied Psychology* 477 (1971); K. R. Laughery, P. K. Fessler and D. R. Tenorvitz, "Time Delay and Similarity Effects in Facial Recognition", 59 *Journal of Applied Psychology* 490 (1974).

286. See generally on the importance of lineup size, G. L. Wells, M. R. Leippe, and T. M. Ostrom, "Guidelines for Empirically Assessing the Fairness of a Lineup", 3 *Law and Human Behavior* 285 (1979); R. S.

Malpass, "Effective Size and Defendant Bias in Eyewitness Identification Lineups", 5 *Law and Human Behavior* 299 (1981).

287. *Home Office Circular 109, 1978*, Rule 14.

288. See American Law Institute, *supra* note 15, p. 434; Project on Law Enforcement Policy and Rulemaking, *supra* note 16, p. 15; Wall, *supra* note 24, p. 53. To further illustrate the diversity in practice, French police officials normally use five or six distractors in a lineup. The Italian *Code of Penal Procedure* requires that once compulsory procedures as to the use of a witness have been completed, a judge is to secure the appearance of two or more persons resembling the suspect. See Murray, *supra* note 14.

289. See, *supra* note 77.

290. See, *supra* note 140.

291. *Satya Narain* v. *State* (1953), 40 A.I.R. 843; *Emperor* v. *Chhadammi Lal* (1936), 23 A.I.R. (A) 373; *Anwar* v. *State* (1961), 48 A.I.R. (A) 50; *Asharfi* v. *State*, *supra* note 65.

292. *Dal Chand* v. *State* (1953), 40 A.I.R. (A) 123.

293. *R.* v. *Jeffries* (1949), 68 N.Z.L.R. 595, [1949] N.Z. Gaz. L.R. 433 (N.Z. C.A.).

294. See Murray, *supra* note 14.

295. *Home Office Circular 109, 1978*, Rule 14.

296. *Id.*, Rule 15.

297. *R.* v. *Dunlop, Douglas and Sylvester*, *supra* note 149.

298. *Parker and Yates* (unreported, B.C. C.A.); *R.* v. *Demich*, *supra* note 149.

299. *R.* v. *Baldwin*, *supra* note 258.

300. *Ram Singh* v. *Emperor* (1943), 30 A.I.R. 269 at 271 (Oudh).

301. *R.* v. *Olia*, [1935] S.A. 213 at 216 (T.P.D.).

302. See Doob and Kirshenbaum, *supra* note 40; see also Loftus, *supra* note 37, p. 146.

303. See Clifford and Bull, *supra* note 37, pp. 196-198.

304. See Doob and Kirshenbaum, *supra* note 40.

305. *Codigo De Procedimientos Para El Distrito Y Territorios Federales* (1931), art. 219.

306. *Home Office Circular 109, 1978*, Rule 14.

307. For example, in a Canadian case it was said that "it should appear that the selection of the other person to form the line-up has been made fairly, so that the suspect will not be conspicuously different from all the others in age or build, colour or complexion or costume or in any other particular": *R.* v. *Goldhar and Smokler*, (1941), 76 C.C.C. 270 at 271-272, [1941] 2 D.L.R. 480 at 481, per Robertson C.J.O. A New Zealand court stated

that "[t]he only satisfactory method of identification where suspects are paraded is where the suspect or suspects are placed amongst a sufficiently large number of persons of similar age, build, clothing, and condition of life, and the witness is then asked, without prompting or assistance, to recognize the offender": *R.* v. *Jeffries*, *supra* note 293, p. 602 (N.Z. L.R.).

308. A few examples should illustrate the variance in lineup participants that the courts are prepared to accept. In *R.* v. *Olbey*, [1971] 3 D.L.R. 225, 13 C.R.N.S. 316, 4 C.C.C. (2d) 103 (Ont. C.A.), the eight participants including the accused ranged in height from 5 feet 4 inches to 6 feet 1 inch; they ranged in weight from 135 pounds to 210 pounds. The accused was 5 feet 4 inches and weighed 135 pounds. Since the accused fell at the very bottom of the represented range of heights and weights, it could be argued that the numerical composition of the lineup did not reflect the likelihood of him being selected purely by chance. The Ontario Court of Appeal, however, expressed no dissatisfaction with the composition of this lineup. In an earlier case, on the other hand, *R.* v. *Opalchuk*, *supra* note 64, a county court judge from Ontario studied a photograph of the lineup from which the accused was selected and concluded that it was "far, far from what is required by law". Yet it would appear that the accused in this case fell much closer, at least with respect to height and weight, to the median of the range represented in the lineup, than did the accused in *Olbey*. The county court judge said:

> On the evidence before me, on my analysis of the line-up I find this: The majority of the line-up were within 1 or 2 inches of the height of the accused. None was his exact height, one was 3 inches shorter and three were 2 inches shorter. None of those in the line-up was of the exact weight of the accused. They ran from 26 lbs under his weight to 30 lbs over his weight. Only one came within 3 lbs of his weight, another within 5. Three only in the line-up were of the same age as the accused. One was 10 years younger, one was 9 years younger, two were 8 years younger, one was 4 years younger, one was 3 years younger, and one was 9 years older. None had black hair, and from my observations here it appears to me (as it did to one of the witnesses to whom I will refer later), that the accused has black hair. It looks almost jet black to me from here, though I may be in error. Three in the line-up had blonde hair and seven had varying degrees of brown hair. As to complexion two were dark, six were fair, one was ruddy and one unspecified. Need I particularize further? I conclude this part by saying the clothes on the other ten in the line-up and the colours thereof varied, it seems to me, as their height, weights and complexions. In any event, it is patent this line-up was far, far from what is required by law.... (pp. 91-92 (C.C.C.))

A year earlier, the British Columbia Court of Appeal voiced no criticism of a lineup consisting of eight men in addition to the accused. They ranged in age from 17 to 25 years and in weight from 130 pounds to 160 pounds. The accused was 26 years old and weighed 140 pounds: *R.* v. *Cadger*, *supra* note 246. However, in another British Columbia case the Court of Appeal quashed the accused's conviction when it was revealed that the witness had described the offender as a "tall and well built man" and the evidence

disclosed that the accused "was the only 'tall, well built man' among the seven [lineup participants]. His height [was] six feet, two inches, and the next tallest man in the line-up was five feet, ten inches": *R* v. *McDonald*, *supra* note 149, p. 352 (C.R.).

The Québec Court of Appeal set aside the accused's conviction in *Nepton* v. *The Queen*, *supra* note 142, p. 162, involving the following facts:

> The appellant was placed in the centre with two other persons on each side. The appellant had black hair while the other four had blond or brown hair. The other four persons were taller or shorter than the appellant. The appellant was dressed differently from the others.

The same court noted disapprovingly in *Sommer* v. *The Queen* (1958), 29 C.R. 357 at 361, that the accused "was however the biggest of the persons in the lineup...".

309. See, *supra* note 99.

310. [1971] 2 O.R. 549, 3 C.C.C. (2d) 153 (C.A.).

311. *Id.*, pp. 157-158 (C.C.C.).

312. *R.* v. *Pett and Bird*, *supra* note 188.

313. See Doob and Kirshenbaum, *supra* note 40.

314. Houts, *supra* note 24, p. 15.

315. Rolph, *supra* note 24, p. 35.

316. For example, see *R.* v. *Sutton*, *supra* note 38, where the suspect had the word "luck" tatooed on his knuckles, there is no indication that attempts were made to disguise the hands of the participants by, for example, requiring them to wear gloves, hold their hands behind their back, or in their pockets. In *R.* v. *Smith*, *supra* note 184, the witness stated that he recognized the accused at a lineup because of a hickey on his neck.

317. See *supra* note 65, p. 160.

318. (1950), 48 Allahabad L.J. 354 (Allahabad H.C.).

319. *Id.*, p. 354.

320. See *supra* note 65.

321. *Id.*, p. 160.

322. *Codice di Procedura Penale*, (1930), article 360.

323. See *supra* note 305, article 219.

324. For example, in an Australian case, *Raspor* v. *The Queen*, *supra*, note 93, the suspect had been described as a motorcyclist, wearing a leather jacket and leather cap. At the parade he was identified while wearing a similar coat and carrying a cap. The accused was not granted leave to appeal and the lineup procedure was not commented upon. In *R.* v. *Martell and Currie* (1977), 23 N.S.R. (2d) 578 at 582, 32 A.P.R. 578 at 582 (N.S. S.C. App. Div.), it was claimed "that the line-up was unfair in that only

the men in it who wore clothes exactly like those described by Mr. Borgia were the appellants...". The court nevertheless dismissed the appeal, admitting however that the lineup "arguably may not have been perfect (what line-up is or can be?) in ensuring adequate uniformity in the appearance of all the men in it." (p. 583 (A.P.R.)).

In *R.* v. *Blackmore*, [1970] 14 C.R.N.S. 62 (Ont. C.A.), the accused was subjected to an informal viewing by the witness. He was one of seven black people in a group of twenty-five to thirty people held in a detention room. The witness stated that the robber had worn a mauve-coloured shirt and trousers. The accused was the only person in the detention room so dressed. In dismissing the accused's appeal, the court relied upon the witness's emphatic statement that he had identified the accused on that occasion upon seeing his face and did not even notice what he was then wearing.

325. For example, in *R.* v. *Dunlop, Douglas and Sylvester*, *supra* note 149, all the accused were known as members of a motorcycle gang. At one of the several lineups one of the accused was identified while wearing "a club T-shirt with a club symbol" (p. 347). Although no particular comment was made on this, two of the accused's appeals from conviction were successful, partly because of the overall weakness of the identification evidence. The victim of an attempted rape in a South African case, *R.* v. *Masemang*, *supra* note 121, p. 448, could only remember her assailant's clothes — in particular a dark maroon jersey. The other ten people in the lineup wore red sweaters but they were noticeably lighter than the accused's. The court stated that the lineup was "conducted in a manner which did not guarantee the standard of fairness observed in the recognised procedure, but was calculated to prejudice the accused." The court in *R.* v. *Harris*, *supra* note 225, quashed the conviction because the trial judge failed to articulate a warning about the dangers of eyewitness testimony. Little weight was attributed to the identification evidence because the witness saw

> . . . a man in a reddish or orange T-shirt on the roof. Several hours later he sees a man in an orange T-shirt in the same suburb in the custody of the police. There would be a strong tendency in the human mind in such a case to reach the conclusion of identity. (p. 450)

In *R.* v. *Smith and Evand*, *supra* note 223, p. 203, the two appellants were identified alone "mainly by their clothes". The appeal was dismissed because other evidence supported the conviction, but the court did say that the procedure adopted rendered the identification evidence "nearly valueless". In *R.* v. *Jeffries*, *supra* note 293, the fairness of the lineup was challenged on the grounds that

> it was contended that the suspects would look so different from Police officers, with blood on their clothing, and, in one case, on the hands, that it was inevitable that the suspects would be identified.
>
> [T]hey were wearing old clothes, and were not as well dressed as the other members of the parade .... (p. 597)

The conviction in this case was affirmed on other grounds.

326. (1958), 29 C.R. 357 (Que. C.A.).

327. See, *supra* note 89.

328. *Id.*, p. 435 (O.R.).

329. In France, see P. Wall, *supra* note 24; Mexican *Code of Penal Procedure*, *supra* note 305, articles 217-224. The English rules, in *Home Office Circular on Identification Procedures, 109 (1978) supra* note 12, allow a suspect to select his own position in the lineup (Rule 6). He must also be informed of his right to change his place after each viewing (Rule 21).

330. See *supra* note 142.

331. *Id.*, p. 162. Another case from Québec in which the fact that the accused stood in the middle of the lineup was noted in discussing the unfairness of the lineup is *Sommer* v. *The Queen*, *supra* note 326. And in *R.* v. *Cadger*, *supra* note 246, p. 213, it was noted that the appellant was identified from a lineup consisting of "eight young men in addition to the appellant who was stationed in the centre of the group." In at least one case, *R.* v. *Minichello*, [1939] 4 D.L.R. 472, 54 B.C.R., 72 C.C.C. 413 (B.C. C.A.), the accused's position in the lineup was the subject of specific complaint. In this case, however, the facts do not show where he was positioned and the court held that the complaint was not substantial: "Marshall picked out the accused in a line-up at the police station. The criticism of his evidence in that connection, viz., in respect to the position of the accused in the line-up is not of a substantial character" (p. 415).

332. Many Codes of Criminal Procedure explicitly provide for such objections. For example, the Mexican *Code of Penal Procedure* allows the person being identified to request the exclusion from the group of those persons who do not resemble the suspect. It is then within the discretion of the instructor judge whether to abide by the request. Furthermore, a suspect may suggest even greater precautions than those provided by the Code and it is then up to the judge to accede to the proposals, as long as they will not prejudice the truth or appear non-useful or malicious. *Supra* note 305, article 220.

    The English Home Office Circular rules state that a suspect should be expressly asked if he or she has objection to the persons present or the arrangements made. It goes on to provide that "[a]ny objections should be recorded and, where practicable, steps should be taken to remove the grounds for objection." *Home Office Circular on Identification Parades 109 (1978)*, Rule 16.

333. See Doob and Kirshenbaum, *supra* note 40.

334. In, for example, *Nepton* v. *The Queen*, *supra* note 142, p. 146, there was a conflict between the testimony of two eyewitnesses and the police as to the makeup of the lineup from which the accused was selected; Mr. Justice Hyde noted "I offer the suggestion that the police should adopt the practice which I have noted in some instances of photographing the line-up so that there could be no dispute as to its composition." In another case, in reviewing the fairness of the lineup, the court noted, "[h]aving examined the photographs I agree with counsel for the appellant that the appellant ... (and co-accused) appear different in appearance and dress from all the others." *R.* v. *Smith*, *supra* note 184, pp. 298-299.

335. See *R.* v. *Sommer*, *supra* note 326; *R.* v. *Sutton*, *supra* note 38; *R.* v. *Gaunt*, *supra* note 78; *Raspor* v. *The Queen*, *supra* note 93.

336. Dent and Stephenson, *supra* note 238.

337. *Asharfi* v. *State*, *supra* note 65, p. 161.

338. (1936), 65 C.C.C. 214 (Man. C.A.).

339. See, *supra* note 258.

340. *Id.*, p. 24.

341. Other cases in which a witness viewed a lineup and identified a suspect as the offender when the offender's face had been fully or partially concealed by a mask at the time of the offence are: *Baxter* v. *The Queen*, *supra* note 256; *R.* v. *Harrison* (No. 3), *supra* note 97; *R.* v. *Kervin* (1974), 26 C.R.N.S. 357 (N.S. C.A.); *R.* v. *Olbey*, *supra* note 308; *R.* v. *Hederson*, *supra* note 140; *R.* v. *Donnini*, [1973] V.R. 67 (Sup. Ct., Vict.). In *R.* v. *Millichamp*, [1921] Cr. App. R. 83, the witness stated that he saw a burglar running away but that he did not see his face. At the lineup the witness did not pick the accused out until all of the participants were requested to turn around. One wonders whether the witness would have identified the accused from a view of his back, if he had not first seen his face.

Another English case in which a witness who admitted to not having seen the offender's face was shown the body and face of the suspect at a lineup is *R.* v. *Bundy* (1910), 5 Cr. App. R. 270 (C.C.A.). The suspect was identified but this was undoubtedly because the police had pointed him out to the witness and stated that he "resembled the man the police suspected of having committed the larceny" (p. 271).

Two other cases in which the witness did not see the offender's face but nonetheless identified the suspect because of his build, clothing and voice are: *R.* v. *Gaunt*, *supra* note 78; *R.* v. *Miles and Haines* (1948), 42 Q.J.P.R. 21, [1947] Qld. St. R. 180 (Qld. Ct. Cr. App.).

342. For a general discussion of the problems of voice identification see Clifford and Bull, *supra* note 37, pp. 118 and following. See also Saslove and Yarmey, "Long-term Auditory Memory: Speaker Identification", 65 *Journal of Applied Psychology* (1980); A. G. Goldstein "Recognition Memory for Accented and Unaccented Voices", 17 *Bulletin of the Psychonomic Society* 217 (1981); B. Clifford, "Voice Identification by Human Listeners", 4 *Law and Human Behavior* 373 (1980).

343. [1955] S.C.R. 593, 21 C.R. 217.

344. *Id.*, p. 602 (S.C.R.), 230 (C.R.).

345. *Supra* note 277.

346. *Id.*, pp. 770-771 (S.C.R.).

347. See, for example, *R.* v. *Braumberger* (1967), 62 W.W.R. 285 at 288 (B.C. C.A.) ("identification by recognition of voice is permissible").

348. See, for example, *R.* v. *Miles*, *supra* note 341, p. 25 (where the witness described the suspect's voice as effeminate); and *Raspor* v. *The Queen*, *supra* note 93, p. 349 (where the witness described the suspect as speaking "with a marked foreign accent").

349. In *R.* v. *Murray (No. 2)*, [1917] 1 W.W.R. 404 at 408 (Alta. S.C.), it was said that:

> There can be no doubt that evidence of identity by means of identification of the voice alone is sufficient evidence. We identify people many times a day in this way in conversations over the telephone. It is scarcely necessary to support this proposition by authority....

350. *Supra* note 308.

351. *Id.*, p. 228.

352. *Supra* note 34.

353. *Id.*, p. 447.

354. *Supra* note 277.

355. *Id.*, in [1976] 1 S.C.R. 763 at p. 770.

356. Thus in *R.* v. *Donnini*, *supra* note 341, p. 69, it is reported that:

> A young woman clerk, Mrs. Judith Riseley, inspected the parade and later gave evidence that she had recognized the applicant as the smaller man at the robbery. She said she had declined to touch him because she was too nervous to do so.

357. See generally D. M. Thomson, "Person Identification Influencing the Outcome", 14 *Australia and New Zealand Journal of Criminology* 49 (1981).

358. G. H. Bower and M. B. Karlin, "Depth of Processing Pictures of Faces and Recognition Memory", 108 *Journal of Experimental Psychology* 751 (1974). D. Godden and A. Baddeley, "When Does Context Influence Recognition Memory?", 71 *British Journal of Psychology* 99 (1980); E. Winograd and N. T. Rivers-Bulkeley, "Effects of Changing Context on Remembering Faces", 3 *Journal of Experimental Psychology: Human Learning and Memory* 397 (1977).

359. Godden and Baddeley, *supra* note 358.

360. *Id.*, p. 99.

361. *Id.*, p. 104.

362. One experimenter, G. Feingold, "The Influence of Environment on Identification of Persons and Things", 5 *Journal of Criminal Law and Criminology* 39 at 47 (1914), has asserted that on the basis of the reliable studies:

> The proper way to obtain successful recognition is not to bring the witness into the police court, but to bring the supposed lawbreaker to the scene of the crime and to have the witness look at him precisely in the

same surroundings and from the same angle at which he saw him originally.

363. See generally, G. Lefcourt, "The Blank Line-up: An Aid to the Defense", 14 *Criminal Law Bulletin* 428 (1978).

364. *Devlin Report* , *supra* note 12, p. 120.

365. See *People* v. *Brown*, No. 1798 (N.Y. Cty. Ct., 1972); and, *People* v. *Hibbs*, No. 1930 (Bronx Cty. Ct., 1974), both referred to in Lefcourt, *supra* note 363.

366. Quoted in Lefcourt, *supra* note 363, p. 431.

367. 60 A. 2d 824 (Penn. Sup. Ct., 1948).

368. *Id.*

369. *People* v. *Kennedy*, 58 N.E. 652 (N.Y. Ct. App., 1900).

370. *Id.*

371. *People* v. *Guerea*, 358 N.Y.S. 2d 925. (Crim. Ct. Bronx Cty., 1974).

372. *Id.*, p. 928.

373. See generally Clifford and Bull, *supra* note 37, p. 203.

374. See *supra* note 150.

375. Some cases in which the repeated showing of a suspect's photograph to prospective witnesses escaped the courts' criticism are: *R.* v. *Audy (No. 2)*, *supra* note 188; *R.* v. *Bagley*, *supra* note 248; *R.* v. *Mingle*, [1965] 2 O.R. 753, [1965] 4 C.C.C. 172 (Mag. Ct.); *R.* v. *Opalchuk*, *supra* note 64; and *R.* v. *Fannon*, *supra* note 259.

376. *Simmons* v. *United States*, 390 U.S. 377 at 386, n. 6 (7th Cir., 1968).

377. See commentary following Rule 501.

378. See commentary following Rule 502.

379. Two Canadian cases in which a witness who had picked out the accused's photograph during the police's search for suspects was not later asked to attempt identification at a lineup are: *R.* v. *Louie*, *supra* note 264; and *R.* v. *Mingle*, *supra* note 375. In neither of these cases did the court comment on the procedure followed.

380. *The Queen* v. *Goode*, *supra* note 152, p. 79.

381. *R.* v. *Dean*, *supra* note 246.

382. This problem arose in an American case, *U.S. ex. rel. Reed* v. *Anderson*, 343 F. Supp. 116 (1972). The accused's mug shot was dated one day after the crime while the others had dates several years old.

383. *State* v. *Alexander*, 503 P. 2d 777 (Ariz. Sup. Ct., 1976).

384. *Rudd* v. *Florida*, 477 F. 2d 805 (5th Cir., 1973).

385. *Id.*, at p. 811.

386. *Supra* note 38.

387. K. R. Laughery, J. F. Alexander and A. B. Lane, "Recognition of Human Faces: Effects of Target Exposure Time, Target Position, Pose Position, and Type of Photograph", 55 *Journal of Applied Psychology* 477 (1971); K. R. Laughery, P. K. Fessler, D. R. Tenorvitz, and D. A. Yovlick, "Time Delay and Similarity Effects in Facial Recognition", 59 *Journal of Applied Psychology* 490 (1974).

388. W. Stern, "Abstracts of Lectures on the Psychology of Testimony and on the Study of Individuality", 21 *American Journal of Psychology* 270 (1910).

389. See Yarmey, *supra* note 37, p. 121; A. Zavala and J. Paley, eds., *Personal Appearance Identification* (Springfield, Ill.: Charles C. Thomas, 1972), p. 314. ("The studies showed that after about fifty mug shots performance of witnesses begins to deteriorate.")

390. See A. Zavala, *supra* note 389, p. 314.

391. See generally Yarmey, *supra* note 37, p. 121.

392. R. Buckhout, "Eyewitness Testimony", 231 *Scientific American* (No. 6) 23 at 27 (1974). ("Research on memory has ... shown that if one item in the array of photographs is uniquely different — say in dress, race, height, sex or photographic quality — it is more likely to be picked out. Such an array is simply not confusing enough for it to be called a test .")

See also R. Buckhout, D. Figueroa and E. Hoff, "Eyewitness Identification: Effects of Suggestion and Bias in Identification from Photographs", 6 *Bulletin of the Psychonomic Society* 71 at 74 (1975).

393. *Id.*, pp. 73-74.

394. K. R. Laughery, "Photograph Type and Cross-Racial Factors in Facial Identification", in A. Zavala and J. Paley, eds., *supra* note 389, Chapter V; A. Paivio, T. B. Rogers and P. C. Smythe, "Why Are Pictures Easier to Recall than Words?", 11 *Psychonomic Science* 137 (1968); K. R. Laughery, J. F. Alexander and A. B. Lane, "Recognition of Human Faces: Effects of Target Exposure Time, Target Position, Pose Position and Type of Photograph", 55 *Journal of Applied Psychology* 477 (1971).

395. See Laughery, *supra* note 394, p. 39.

396. Sussman, Sugarman, Zavala, "A Comparison of Three Media Used in Identification Procedures", in A. Zavala and J. Paley, eds., *supra* note 389, Chapter XI.

397. For example, recent research indicates that photographs presented in a three-quarter pose are more identifiable than full-face poses. See K. E. Patterson and A. D. Baddeley, "When Face Recognition Fails", 3 *Journal of Experimental Psychology: Human Learning and Memory* 406 (1977); F. L. Krouse, "Effects of Pose, Pose Change, and Delay on Face Recognition Performance", 66 *Journal of Applied Psychology* 651 (1981).

398. *R.* v. *Johnson*, *supra* note 227, p. 495 ("The four separate photographs, including that of the appellant, were filed as an exhibit. We have inspected them and note that they are photographs of four remarkably similar-looking,

long-haired youths"); *R.* v. *Russell*, *supra* note 244, p. 29 ("to ensure that no injustice was done to the appellant we have inspected the photographs which were shown to Miss Berkland and we are satisfied that the general similarity of four of the men depicted in them provided her with a very real test of her ability to identify the photograph of the appellant"); *R.* v. *Nagy*, *supra* note 239, p. 635, ("the police authorities produced 10 pictures, of persons of some similarity in appearance").

399. *R.* v. *Pace*, *supra* note 154, p. 299.

400. *Id.*, p. 307.

401. For example in *U.S.* v. *Harrison*, 457 F. (2d in 1972), only the accused was clean shaven; in *Caywood* v. *State*, 311 N.E. 2d 845 (Ind. Ct. App., 1974), the accused had a noticeable lighter skin colour than the others pictured; in *Haberstroh* v. *Montayne*, 362 F. Supp. 838 (W.D.N.Y., 1973), only the accused's photograph remotely fit the description given by the witness; in *United States* v. *Fernandez*, 456 F. 2d 638 (2d Cir., 1972), no photograph in the array remotely resembled the suspect's skin colour and hairdo; in *State* v. *Wettstein*, 501 P. 2d 1084 (Utah Sup. Ct., 1972), the accused was the only person in the photographs to have a mustache.

402. For example, the following procedures received little or no criticism from the courts. In *U.S.* v. *Bell*, 457 F. 2d 1231 (5th Cir., 1972), only the accused's photograph provided a full-length view; in *People* v. *Hudson*, 287 N.E. 2d 297 (Ill. Ct. App., 1972), the accused's colour photograph was displayed with nineteen black and white photographs; in *State* v. *Farrow*, 294 A. 2d 873 (N.J. Sup. Ct., 1972), the accused's photograph was one inch larger in length and width than the four others; in *U.S.* v. *McGhee*, 488 F. 2d 781 (5th Cir., 1974), the accused's was the only photograph which was in focus; in *U.S. ex rel. Clemmer* v. *Mazurkiewicz*, 365 F. Supp. 1158 (E.D. Penn., 1973), of nine photographs shown to the witness only the accused's was not a mug shot; in *U.S. ex rel. Reed* v. *Anderson*, *supra* note 382, the accused's mug shot was dated one day after the crime while the others had dates several years old; and in *State* v. *Williams*, 526 P. 2d 714 (Ariz. S.C., 1974), the accused's photograph was unique in being a Polaroid photo and somewhat smaller than the others.

403. *Supra* note 149.

404. In *R.* v. *Smierciak*, *supra* note 85, two weeks after a man attempted to cash a forged cheque, the bank teller was shown a single photograph of the accused whom she identified as the man in question. In quashing the accused's conviction, Mr. Justice Laidlaw stated:

> [I]f a witness has no previous knowledge of the accused person so as to make him familiar with that person's appearance, the greatest care ought to be used to ensure the absolute independence and freedom of judgment of the witness. His recognition ought to proceed without suggestion, assistance or bias created directly or indirectly.... Anything which tends to convey to a witness that a person is suspected by the authorities, or is charged with an offence, is obviously prejudicial and wrongful. Submitting a prisoner alone for scrutiny after arrest is unfair and unjust. Likewise, permitting a witness to see a single photograph of a suspected

person or of a prisoner, after arrest and before scrutiny, can have no other effect, in my opinion, than one of prejudice to such a person. (p. 157-158)

In *R.* v. *Babb*, *supra* note 89, the witness had already pointed out the accused to the police as the person who had assaulted him three weeks before. The accused was a transvestite whom the witness had only seen dressed in women's clothing. Two weeks later, the police invited the witness to the police station and showed him a single photograph of the accused, depicting him as a male. In quashing the conviction, the court criticized this method of identification:

> At this time in judicial history certainly almost every police force in the country must know and appreciate the frequently announced attitude of the courts of our country with reference to showing a single photograph to a complainant who might later be called upon to testify and identify that person.... In the circumstances, the showing of this picture to the complainant was, I think, highly irregular and completely and totally unjustified. (p. 372)

405. See, for example, *R.* v. *Goode*, *supra* note 152, p. 79; *R.* v. *Sutton*, *supra* note 38, p. 309; and *R.* v. *Courtney* (1956), 74 W.N. (N.S.W.) 204 (N.S.W. Ct. Cr. App.), p. 205. The convictions in these cases were quashed because the jury had not been warned about the unreliability of single-photograph identification.

406. *Astroff* v. *The King* (1931), 50 Que. K.B. 300, 56 C.C.C. 263 (Que. C.A.); *R.* v. *Ayles*, *supra* note 84; *R.* v. *Richards*, *supra* note 142; and *R.* v. *Griffiths*, [1930] Vict. L.R. 204, [1930] Arg. L.R. 121 (Vic. S. Ct.).

407. *R.* v. *Griffiths*, *supra* note 406, p. 207.

408. *State* v. *Farrow*, 294 A. 2d 873 (N.J. Sup. Ct., 1972).

409. *Supra* note 220. For example, in *R.* v. *Johnson*, *supra* note 227, the two witnesses separately identified the accused's photograph from a group consisting of only three others. And in *R.* v. *Braumberger*, *supra* note 347, photographs of the three suspected bank robbers were placed together in a group containing the photographs of only four other men.

410. *R.* v. *Pace*, *supra* note 154, p. 307.

411. *State* v. *Watson*, 345 A. 2d 532 (Conn. S. Ct., 1973).

412. *U.S.* v. *Ash*, *supra* note 178.

413. *Supra* note 248.

414. *R.* v. *Bagley*, [1926] 3 D.L.R. 717-718, 37 B.C.R. 353, 46 C.C.C. 257.

415. *R.* v. *Kervin* (1974), 26 C.R.N.S. 357 (N.S. C.A.).

416. *R.* v. *Pace*, *supra* note 154.

417. *Supra* note 78.

418. Rule 201 of the Arizona Report's Model Rules, *supra* note 16, makes provision for confrontations in such circumstances:

An officer may arrange a confrontation between a suspect and a witness whenever the suspected is arrested or temporarily detained within two hours of the offence, and the witness is cooperative and states that he might recognize the person who committed the offense, [and a lineup valid under these Rules cannot be promptly arranged].

The ALI's Model Code, *supra* note 15, contains a similar provision. It is justified on the grounds of "countervailing policy considerations of prompt accuracy and police efficiency" (p. 436).

419. The research in this area has produced divergent results and any generalization might be hazardous, but compare A. G. Goldstein and J. E. Chance, "Visual Recognition Memory for Complex Configurations", 9 *Perceptual Psycholophysics* 237 (1978); K. R. Laughery, P. K. Fessler and D. R. Tenorvitz, "Time Delay and Similarity Effects in Facial Recognition", 59 *Journal of Applied Psychology* 490 (1974); A. G. Goldstein, "The Fallibility of the Eyewitness: Psychological Evidence", in B. D. Sales, ed., *Psychology in the Legal Process* (New York: Spectrum, 1977), p. 223; H. Ellis, "An Investigation of the Use of the Photo-fit Technique for Recalling Faces", 66 *British Journal of Psychology* 29 (1975); M. R. Courtois and J. H. Mueller, "Target and Distractor Typicality in Facial Recognition", 66 *Journal of Applied Psychology* 639 (1981); G. Davies, H. Ellis, and J. Shepherd, "Face Identification: The Influence of Delay Upon Accuracy of Photofit Construction", 6 *Journal of Police Science and Administration* 35 (1978); F. L. Krouse, "Effects of Pose, Pose Change, and Delay on Face Recognition Performance", 66 *Journal of Applied Psychology* 651 (1981).

420. Although there are no reported cases dealing with this question, in *R.* v. *Denning and Crawley* (1958), 58 S.R. (N.S.W.) 359 at 361, (N.S.W. C.C.A.), the police stopped the accused on the street and told him that there had just been an attempted robbery nearby. The accused "denied being concerned with it and asked to be taken there. The police did so". He was identified by the witnesses and subsequently convicted at trial.

421. *Supra* note 175.

422. *Id.*, p. 302.

423. For example, in *R.* v. *Smith and Evand*, *supra* note 223, the appellants were identified alone at the police station. In dismissing the appeal from conviction, the court said:

> [T]here was a good deal that was unsatisfactory about the identification at the police station.... Such methods as were resorted to in this case make this particular identification nearly valueless, and police authorities ought to know that this is not the right way to identify. However, apart from that, there was ample evidence of identification.... (p. 204)

The conviction in *R.* v. *Williams*, *supra* note 223, was quashed in part because:

> The case for the prosecution at the trial evidently rested on the identification by Fulcher; this identification was not properly carried out: Fulcher saw the appellant alone in the police station, and did not pick

him out from among other men. In the opinion of the Court, the mode adopted was not a proper one, and therefore the identification cannot be said to have been satisfactory. (p. 88)

Similarly, the conviction in *R.* v. *Keane*, *supra* note 82, was quashed because the identification "was achieved at a confrontation organised by P. S. Pitches at the police station, the circumstances of which robbed it of any great value" (p. 249).

424. For example, in *R.* v. *Gagnon*, *supra* note 184, the accused was brought by the police before a woman who had been brutally assaulted earlier that evening. In quashing the accused's conviction the British Columbia Court of Appeal noted:

> The manner in which she made that identification also weakens the force of that evidence. Two police officers took Gagnon into the complainant's presence, and one asked her if he was the man. She said he was. She did not pick Gagnon out of a line-up. Those circumstances increased the need for careful examination of the evidence in the light of the probabilities in order to avoid the possibility of innocent mistake in identification. (p. 302)

Similarly, in *R.* v. *Preston*, [1961] Vict. R. 761 (Vict. S.C.), the accused was brought before the witness about an hour after a housebreaking incident:

> The fact that the man was brought back to the witness by a police constable might be said to originate a suggestion in the witness's mind that this was the man who had committed the breaking, entering and stealing, and was a matter which should have called for some comment by the trial judge. Finally, in this case, there was no parade. I have said that as a matter of law a parade is not necessary, but it is one feature which the learned judge might have drawn to the attention of the jury. (p. 763)

425. *Supra* note 422.

426. *Id.*, p. 361.

427. *Ibid.*

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